Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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KATHLEEN R. REITER,

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SONOTONE CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, a consumer, petitions this Court to issue a Writ of Certiorari to review the decision of a two judge panel[1] of the Eighth Circuit filed on June 19, 1978, denying standing to consumers of the United States under Section 4 of the Clayton Act. A Petition for Rehearing En Banc was denied on August 11, 1978, by a 4-3 split in the Court.

OPINIONS BELOW

The Statement by the three judges favoring a rehearing *en banc* is reported in 1978-1 Trade Cases para. 62,183, —— F.2d ——. The opinion by the two-judge panel is reported in 1978-1 Trade Cases para. 62,098, —— F.2d ——. The opinion by the Honorable Earl R. Larson, of the District of Minnesota, is reported in 435 F. Supp. 933.

[1] Judge Webster heard argument but took no part in the decision.

JURISDICTION

On June 28, 1977, the Eighth Circuit, pursuant to 28 U.S.C. Sec. 1292 (b), granted the defendant companies' application for leave to take interlocutory appeal, from which the appeal was perfected. The date of the entry of the judgment of the two judge panel of the Eighth Circuit was June 19, 1978. The plaintiff consumer's Petition for Rehearing En Banc was denied by Order entered August 11, 1978, with three of the seven judges dissenting therefrom. This Petition was filed within ninety days thereafter in accordance with 28 U.S.C., Sec. 1254 (1) for determination and relief as provided in 28 U.S.C., Sec. 2106 or otherwise.

QUESTION PRESENTED

Do not consumers who purchase price-fixed property for personal use suffer injury to their "property" within the meaning of Section 4 of the Clayton Act?

STATUTE INVOLVED

Section 4, Clayton Act. (October 15, 1914, Chap. 323 Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.)

Sec. 4. That *any person* who shall be *injured* in his business *or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. (emphasis herein).

STATEMENT OF THE CASE

Petitioner cannot improve on the concise statement by the Honorable Earl R. Larson in his Memorandum Order of March 31, 1977, wherein he upheld consumers after describing the case as follows:

> Plaintiff, along with all potential members of the class she seeks to represent, is a purchaser of a hearing aid manufactured by one of the defendants and distributed by methods that allegedly contravene the antitrust laws. She is not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. *She is the classic consumer plaintiff.* (emphasis herein) (A. 3)

The basis for federal jurisdiction in the District Court were sections 14 and 16 of the Clayton Act.

ARGUMENT

> "This issue *will undoubtedly be decided by the Supreme Court*, and to the extent that it is possible to divine the result, I conclude that the Court believes that retail consumers do have standing to sue under the Clayton Act . . . .
>
> In short, both the dicta and the presuppositions in the recent Supreme Court opinions suggest that *the Court will hold* that a consumer such as the present plaintiff may sue under the Clayton Act."

The quotation is from the opinion by Judge Nickerson in *Theophil v. Sheller—Globe Corp.* 44 F. Supp. 131, 135 (E.D. N.Y. 1978). He fully expects this Court to decide the question. He lined up with the many other Judges that have cited and followed Judge Larson herein. This case is the first one to present the question to this Court. The question is an important question of federal law which has not been, but should be settled by this Court.

To this date, no Circuit Court, other than the *Eighth* herein, has decided the question. The distinct District Judge that has not followed Judge Larson herein and that is Judge Williams of the Northern District of California in a "trilogy" of opinions cited in the Panel opinion herein. The other Judges that have concluded the same as Judge Larson did herein are listed as follows:

In re Ampicillin Antitrust Litigation
1977-1 Trade Cases Para. 61,434 (D.C. 5/17/77)

De Gregario v. Segal
443 F. Supp. 1257 (E.D. Pa. 1978)

Kaplan v. Rolex
Los Angeles Superior Ct., CA000,467, Minute Order by Judge David Thomas 8/11/78

In re Petroleum Products Antitrust Litigation
1977-2 Trade Cases Para. 61,639 (C.D. Cal. 9/16/77)

Rosack v. Volvo of America Corp.
1977-1 Trade Cases Para. 61,395 (Cal. Superior Ct. 3/16/77)

Theophil v. Sheller-Globe Corp.
446 F. Supp. 131 (E. C. N. Y. 2/23/78).

In a Memorandum Opinion, July 5, 1978, Judge Richey again had the question before him in the *Ampicillin Antitrust Litigation* M.D.L. Dkt. No. 50, Misc. 45-70 (D.C. 7/5/78) and again concluded as follows:

> "The Court concludes, based on *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In re Petroleum Products Antitrust Litigation* 1977-2 CCH Trade Cas. Para. 61,639 (C.D. Cal. 1977); and *Reiter v. Sonotone*, 435 F. Supp. 933 (D. Minn. 1977), that the prevailing and better view is that these plaintiffs do have standing to seek treble damages under Para. 4 of the Clayton Act."

The commentary by the District of Columbia Circuit Court should be added to the list. *Cleary v. Chalk*, 488 F. 2d 1315, 1319 n. 17 (D.C. Cir. 1973), *cert. den.*, 416 U.S. 938 (1974).

Professor Sullivan has expressed his view that:

> "Analysis suggests that a non-business consumer who has paid a higher price because of an anti-trust violation also has a cause of action under section 4."

He goes on to discuss Mr. Justice Holmes and Congress and concludes:

> "This rationale clearly covers the 'property' of an ultimate consumer as well as that of a business firm. Courts and commentators seem to have accepted this position without much discussion."

The professor then considers that the opinions of this Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) support consumer standing. See L. Sullivan, Antitrust 771 n. 3 (1977).

The Panel opinion tries to lay the blame on Mr. Justice Marshall's passing comment in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) where he had said:

> "Like the lower courts that have considered the meaning of the words 'business or property' we conclude that they refer to commercial interests or enterprises."

Anyone familiar with the antitrust decisions of the Supreme Court would find it cruel indeed to rely in particular on a statement by Mr. Justice Marshall to *deny* consumers standing under the antitrust laws. Further on in that opinion he raises a stentorian call-to-arms for classes of private citizens such as the consumer class herein. The opinion proclaimed in conclusion:

> "We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.
>
> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 USC §1337; 15 USC §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents, in moving to dismiss count three of the fourth amended complaint, in which the State sought to bring such an action, virtually conceded that class actions might be appropriate under certain circumstances. The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorneys' fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.
>
> Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries."
> 405 U.S. 265, 266.

The Panel cites the *Pfizer, Inc. v. Government of India*, 54 L.Ed.2d 563 (1978) opinion many times. However, the Panel overlooked the key phrase in the *Pfizer* opinion which, of course, is the one stating that:

> "Clearly therefore, Congress did not intend to make the treble damage remedy *available only to consumers* in our own country". (54 L. Ed. 2d 563, at 570) (emphasis herein).

This Court could not have made itself more clear. Indeed, if one reads the Panel opinion in footnote 12 where *Pfizer* is first cited, one would have to believe that the Panel was bound to affirm Judge Larson, cf *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, Footnote 10 (1977); *Goldfarb v. Virginia State Bar*, 421 U. S. 733, 782, 783, 787, 788 and 792 (1975); *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 264 (1972);

Mandevill Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 236 (1948).

The question emanated from the opinion by Judge Henley while still a District Judge, in *Ragar v. T.J. Raney and Sons*, 388 F.Supp. 1184, 1187 (E.D. Ark), aff'd, 521 F.2d 795 (8th Cir. 1975).

See this Petitioner's counsel's letter back on November 5, 1975, to Judges Matthes, Heaney, Stephenson and Henley (reprinted herein Add. p. 2). From that date forward, the Eighth Circuit had the question in mind. The Panel bootstraps itself here. Judge Williams cited and relied on the *Ragar* opinion and the Panel recognizes that reliance (Pan. Op. 12, fn. 11). Now, based upon the fact that Judge Williams "examined" the "language" in *Ragar*, the Panel goes full circle and cites and relies on *Ragar* as "approved" language in the Eighth Circuit. (Pan. Op. 13). This is done with no recognition of the four other judges, each following Judge Larson, who had already examined the language of *Ragar* and did not apprehend it as a bar to consumers.

It is perhaps most confusing that just four days before the Panel opinion herein, Judge Henley wrote the antitrust opinion in *Stifel, Nicolaus & Company v. Dain, Dalman & Quail*, 1978-1 Trade Cases para. 62,094 (8th Cir. 1978). In footnote one in *Stifel*, Judge Henley described section four of the Clayton Act as follows:

> "Section 4 of the Clayton Act of 1914, 15 U.S.C. para. 15, gives to an *individual* who is *injured* as a result of violations of para. 1 or para. 2 of the Sherman Act a *private* cause of action in which, if successful, he may recover treble damages, costs and an attorney's fee."

Supra, at page 74,793 (emphasis herein). Petitioner finds it particularly significant that Judge Henley used the term "individual" rather than the statutory term "person". Consumers are "individuals" whereas corporate businesses are not. It is ironic that Judge Larson sat by designation in *Stifel*. Judge Larson certainly would have expressed objection had Judge Henley apprehended section 4 differently than had Judge Larson herein. The definition in *Stifel* is what this Petitioner anticipated from Judge Henley and it should have dictated the result just four days later herein.

The legislative history of section 4 of the Clayton Act and its predecessor statute has recently been analyzed by this Court in footnote ten of the opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The references therein by this Court clearly favor consumer standing herein.

> 10. Treble damage antitrust actions were first authorized by § 7 of the Sherman Act, 26 Stat 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals," especially consumers, 21 Cong Rec 1767 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. Id., at 2456 (Sen. Sherman).
>
> When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under §7 of the Sherman Act" to persons injured by virtue of any antitrust violation. HR Rep No. 627, 63d Cong, 2d Sess, 13 (1914). The initial

House debates concerning provisions related to private damage actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong Rec 9073 (1914) (remarks of Rep. Webb); see e.g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin); 9414-9417, 9466-9467, 9487-9595. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble damage suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, e. g., id., at 14818-14821 (Sen. Reed), 16042-16046 (Sen. Norris).

At this point, we can trace the statement by Justice Marshall in *Hawaii, supra*, right back to the only court decision squarely on this very question. Justice Marshall cited (405 U.S. at 264) three cases, the second of which is *Hamman v. U.S.*, 267 F.Supp. 420 (D.Mont. 1967) where survivors of accidently killed construction workers were denied loss of consortium because it was held not to be an antitrust-type property interest. In *Hamman* the Court noted 267 F.Supp. at 432, that the plaintiff correctly cited *Waldron v. British Petroleum Co.*, 1964 CCH Trade Cas. p. 71,165 (S.D.N.Y. 6/23/64) for the principle that "property" is a much broader term than "business". The court in *Waldron, supra*, had expressly held:

"The above analysis would be dispositive of this issue if §4 of the Clayton Act protected only a person injured

in his 'business.' However, §4 has a broader sweep. It provides that 'any person who shall be injured in his business *or property* . . . may sue' (Emphasis original.)

The majority of cases cited by defendants do not advert to the distinction between 'business' and 'property" for the simple reason that that distinction was not in issue in those cases, as it is here.

The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'

The statute does not set up a qualitative or quantitative test to determine the existence of 'property.' Nor does the statute contain a built-in definition.

The word 'property' is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether plaintiff has 'property' involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property.' "

That court held that plaintiffs' contract was "property", although not a "business" because incipient, and afforded standing.

The Seventh Circuit followed *Chattanooga Foundry, supra*, and said in *Congress Building Corp. v. Loew's Inc.*, 246 F.2d 587, 594, that the "business" argument need not be considered since the plaintiff was injured in his property, because, "*A*

man is injured in his property when his property is diminished". (Emphasis herein). *Utah Gas Pipelines Corp. v. Natural Gas Co.*, 233 F.Supp. 955, 964 (D.Utah, 1964).

Finally, on this point, Judge Neville, late of the District of Minnesota, cited and followed the oft-quoted statement of Mr. Justice Holmes. See *Minnesota v. U.S. Steel Corp.*, 299 F.Supp. 596, 604 (D.Mn. 1969) where Judge Neville also noted that:

> "Yet, as a practical matter, a suit by a governmental claimant who is a purchaser not engaged in business for profit is probably limited to the increased costs theory of damages."

In other words, non-business plaintiffs such as consumers herein, measure their damage by the amount of the overcharge.

The Ninth Circuit very recently cited the legislative intent to be the "maximization of consumer welfare" in *Boddicker v. Arizona State Dental Assn.*, 1977-1 CCH Trade Cas. para. 61,258 (9th Cir. 1/6/77) fn. 10 on p. 70,797:

> "In an exclusive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded:
>
> '[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.' Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7, 10 (1966)."

The Congressional Record is replete with references to consumers being given standing. Before Section 4 of the Clayton Act, we had Section 7 of the Sherman Act, the first version

of which was criticized for not being strong enough for *consumers* suing large corporate violators. See remarks by Senators Coke, Hiscock and Teller in 21 *Cong. Rec.* 2615, 2571 and 2572 respectively.

Senator Sherman said the intent of Section 2, the harbinger of Section 7, was to give "private parties a remedy for personal injury" caused by a violation. 21 *Cong. Rec.* 2456. Senator George made it clear that under Section 7, a consumer was thought to be "the party necessarily demnified or injured". 21 *Cong. Rec.* 1767-68.

The redraft of Section 7 strengthened the hand of consumers by providing for *treble* damages and expressed "business or property" injury. 21 *Cong. Rec.* 2901. At the time he presented the redraft to the Senate, Senator Hoar simply stated "I shall not undertake to explain the bill, which is well understood." 21 *Cong. Rec.* 3145.

There simply was no substantive change as defendants attempted to argue below. Senator Morgan had commented that a *personal* remedy was being given to *whoever* may be injured in his business or property. (Emphasis herein.) 21 *Cong. Rec.* 3149.

Significantly, the Senate debate after the redraft of Section 7 concerned possible amendment to then provide for *class* actions by consumers (who obviously then must have had individual standing). 21 *Cong. Rec.* 3147-51. The concerned remarks about practicality of consumer suits noted by defendants (Dr. Br. 17-18) were to strengthen the provision and did *not* concern the question of standing.

Section 4 of the Clayton Act was only a reenactment of Section 7. See 51 *Cong. Rec.* 9164; 14,214; 15,938; 16,319; House Report No. 627 at p. 36; Senate Report No. 698.

This Court said in *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977) that the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1394-96 (1976):

> ". . . did not alter the definition of which overcharged persons were injured within the meaning of Section 4. It simply created a new procedural device—parens patriae actions by States on behalf of their citizens—to enforce existing rights of recovery under Section 4". (emphasis herein) 431 U.S. at 733 n. 14.

Mr. Justice Rehnquist recently noted "a congressional policy favoring private enforcement of the antitrust laws" and added that "undoubtedly there exists a strong national interest in antitrust enforcement". *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977).

Foreign governments have standing to sue and because of the reasoning of the Panel herein in attempting to rationalize away Mr. Justice Holmes' opinion in *Chattanooga Foundry*, such governments are now guaranteed continued standing while American consumers are to be denied access to the Courts of this nation. Such a result is incredible and this Court should strike it down forcefully on behalf of the people. The Eighth Circuit is split four to three and the Panel should be reversed accordingly.

CONCLUSION

Mr. Justice Holmes could not have made it more clear when he said that:

> "A man is injured in his property when his property is diminished."[2]

Dated: October 6, 1978.

Respectfully submitted,

John E. Thomas
Attorney for Petitioner
360 Wabasha Street
St. Paul, MN 55102
612/298-1950

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[2] *Chattanooga Foundry & P. Works v. Atlanta*, 203 U.S. 390, 396 (1906); Cf. *Congress Building Corp. v. Loew's Inc.*, 246 F. 2d 587, 594 (7th Cir. 1957); *Utah Gas Pipelines, Corp. v. Natural Gas Co.*, 233 F. Supp. 955, 964 (D. Utah 1964).

ADDENDUM

United States Court of Appeals
For The Eighth Circuit
St. Louis, MO 63101

November 10, 1975

Mr. John E. Thomas
Cochrane & Bresnahan
Suite 500 Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102

Re: 75-1175. Ragar & Ferra v. Raney & Sons, et al.

Dear Mr. Thomas:

The enclosures received with your letter of November 5, 1975, have been submitted to the judges mentioned in your letter.

The court has directed me to advise you that the letters have been received and read.

Please be assured that if I receive further directions in this case you will be so advised.

Very truly yours,
ROBERT C. TUCKER
Clerk

November 5, 1975

Honorable M. C. Matthes
Honorable Gerald W. Heaney
Honorable Roy L. Stephenson

Re: Rager v. Raney & Sons, No. 75-1175

Dear Judges:

Because of the per curiam reference of this Court, I read with interest, the trial court opinion by the Chief Judge Henley in 388 Fed. Supp. 1184. I believe Judge Henley's dismissal was founded on two independent grounds. The first was a lack of standing. The second was a lack of competitive injury to a business. Since those plaintiffs were simply property owners, I am afraid such a holding affectively bars all antitrust suits by consumers. I am not aware of any such holding by any other court. Consumers have been held to be too "remote" in certain circumstances. Although this question was not at issue, this Court denied interlocutory appeal of a certified antitrust class of consumer—home buyers in *Greater Minneapolis Area Board of Realtors v. Forbes*, 1973-2 Trade Cases 74,651, at page 94,858.

If deemed fit and appropriate, perhaps this Court's opinion might be amended to affirm only on the lack of standing. (The Ninth Circuit has recently amended two of it's antitrust opinions, 734 A.T.R.R., at A-16 and A-17). Such clarification could avoid the type of situation that had to be cleared up recently by this Court in *Carlson Companies, Inc. v. S & H Co.*, 1974-2 Trade Cases par. 75,428, at page 98,425 (1974).

Aside from my interest in the opinions of this Court as an antitrust practitioner, I must disclose that I presently do represent a plaintiff-consumer in an antitrust class action getting under way in the District of Minnesota before Judge Larson.

However, the question I've presented here has not yet been raised by defendants before Judge Larson.

Respectfully,
COCHRANE & BRESNAHAN
By John E. Thomas

JET: sr
cc: Honorable J. Smith Henley

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-75-Civil 206

KATHLEEN R. REITER, et al,

Plaintiffs,

vs.

SONOTONE CORPORATION, BELTONE ELECTRONIC CORPORATION, DAHLBERG ELECTRONIC, INC., TEXTRON, INC., RADIOEAR CORPORATION,

Defendants.

AMENDED ORDER

The Order of this Court issued March 31, 1977, is hereby amended as follows:

Page 4, first full paragraph, first sentence should read:

> Defendants base much of their argument on the holding in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.) *cert. den.* 414 U.S. 1045 (1973), which dismissed governmental plaintiffs who alleged general economic harm rather than specific injury to the states as consumers. *Multidistrict Vehicle Air Pollution, supra,* at 125.[2]

Page 7, prior to the Order statement, add:

> This Court is of the opinion that its Order involves a con-

trolling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of litigation.

Page 7, add to Order statement:

That all further proceedings in this matter, including discovery, shall be stayed, pending the disposition by the Court of Appeals of defendants' appeal from this Order.

EARL R. LARSON
United States District Judge

May 10, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-75-Civ. 206

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation, and RADIOEAR CORPORATION, a Delaware corporation,

Defendants.

MEMORANDUM ORDER

Plaintiff Kathleen R. Reiter brings this antitrust action seeking damages and injunctive relief against five manufacturers of hearing aids. In her complaint she requests certification of a class consisting of all persons who have purchased hearing aids manufactured by any of the defendants. All defendants except Sonotone, which has not appeared in any proceeding in this case, move for dismissal or, in the alternative, for summary judgment.

Plaintiff, along with all potential members of the class she seeks to represent, is a purchaser of a hearing aid manufactured by one of the defendants and distributed by methods that allegedly contravene the antitrust laws. She is not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. She is the classic consumer plaintiff.

Defendants base their motion solely on the ground that plaintiff and the members of any class she would represent lack standing to sue for damages under § 4 of the Clayton Act, 15 U.S.C. § 15. In support of their arguments defendants have cited an impressive array of cases dealing with the standing issue. They concede, however, that apart from a very recent set of opinions issued by Honorable Spencer Williams, United States District Judge for the Northern District of California,[1]

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[1] *Morgan v. Federated Dept. Stores, et al*, Civ No. 76-1429 SW; *Weinberg v. Federated Dept. Stores, et al*, Civ No. 76-367 SW; *Smith, et al v Toyota Motor Sales USA, Inc., et al*, No. C-75-0727 SW; *Gutierrez, et al v. E. & J. Gallo Winery Co., Inc., et al*, No. C-75-0001 SW (Jan. 11, 1977). In three identical opinions, Judge Williams dismissed the cases for lack of standing on the part of plaintiff consumers. In a letter to counsel for plaintiffs in these cases, dated March 16, 1977, he has denied rehearing.

there exists no case law precisely on point. To date, a number of large consumer class actions have been prosecuted, many to conclusion, without any consideration of the standing issue raised here. This case therefore is one of first impression in this district and, if only published precedent is considered, nationally.

A. *The "Target Area" Test.*

Development of standing doctrine under § 4 of the Clayton Act has been shaped by judicial awareness of a need to limit the statute's seemingly broad grant of rights to sue: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . ." As the Second Circuit has remarked, a literal interpretation of these words would open the "floodgates to all, no matter how remote their interest or incidental their relationship;" given the imprecision of substantive antitrust statutes and doctrine, such limitation of standing is necessary to keep the caseload and the fact situations of the cases within manageable bounds. *Calderone Enterprises Corporation v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 at 1295-96 (2d Cir. 1971), *cert. den.* 406 U.S. 930 (1972). Therefore, in analyzing a plaintiff's relationship to defendants and to the alleged facts, the Court must ask whether plaintiff is a person within the "target area" of the alleged antitrust conspiracy. *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 at 689 (8th Cir. 1966) (explicitly endorsing application of the "target area" test as explained in *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 at 362 (9th Cir. 1955)).

The target area test is essentially a measure of remoteness of injury resulting from antitrust violations. In most cases it

serves to eliminate those plantiffs whose business relationship with defendants is so attenuated as to render the alleged injury negligible or highly speculative. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 310 (S.D. N.Y.1971) (farmers whose purchase of poultry feed was several levels removed from the actions of drug manufacturers, so that damage could not possibly be established, lacked standing); *Nassau County Association of Insurance Agents, Inc. v. Aetna Life and Casualty Co.*, 361 F. Supp. 967 (S.D. N.Y. 1973), *aff'd* 497 F.2d 1151 (2d Cir.), cert den 419 U.S. 968 (1974) (injury to association of insurance agents too remote where actions of company directed at the agents); *Calderone Enterprises Corp., supra,* (theatre landlord whose lessee's revenue, upon which the rental was partially based, were adversely affected by defendants' business methods, too remote); *State of Illinois v. Ampress Brick Co., Inc.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd in part* 536 F.2d 1163 (7th Cir. 1976), *cert. granted* 45 U.S.L.W. 3340 (Nov. 8, 1976) an "ultimate" consumer or user of goods distributed by means involving antitrust violations has standing to attempt proof of damages and is not precluded by "remoteness" even where the goods have passed through intermediaries and been altered).

The standing of persons whose business relationship to defendants is solely that of ordinary consumer must be evaluated in the same manner. Where the injury is so remotely connected to the alleged conspiracy that damages can only be speculative, the consumer lacks standing. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) (monopolization of telephone equipment market aimed at "manufacturers, sellers, and lessors" of equipment rather than subscribers); *Lefrak v. Arabian American Oil Co.*, 405 F. Supp. 597

(E.D. N.Y. 1975) (consumer is within target area of foreign suppliers' conspiracy to fix prices of home heating oil).

Plantiff here is a purchaser of an item that is sold in the form in which it is manufactured; it does not become part of something else before the consumer obtains it, so that the market effects of anticompetitive practices are readily ascertainable as to each hearing aid sold. *State of Illinois v. Ampress Brick, supra.* The presence of retailers in the distribution chain does not shield defendants from suit based on defendants' actions. *Lefrak, supra*; *In re Master Key Antitrust Litigation,* 528 F.2d 5 at 12 (2d Cir. 1975). If defendants did indeed conspire to limit competition between themselves, the consumers for whose use hearing aids are manufactured are clearly "targets" of the conspiracy.

B. *"Business or Property."*

Defendants also argue that consumers cannot have standing to sue under the antitrust laws because the injury to "business or property" which gives rise to a right of action under Clayton Act § 4 must be to plaintiff's business interests. The Court cannot agree with that conclusion.

Most of the cases dealing with consumer standing under § 4 involve businessman "consumers"—persons who can and do allege injury to their commercial interests by virtue of defendants' actions. For this reason, much of the judicial language cited by defendants is inapplicable in this context. *See, e.g., Calderone, supra,* (requirement of competitive injury applied to eliminate plaintiff-businessman whose injury was too remote); *GAF Corp. v. Circle Floor Co., Inc.,* 463 F.2d 752 (2d Cir. 1972); *cert. dism.* 413 U.S. 901 (1973) (requirement of competitive injury applied to eliminate plaintiff corporation fighting attempted takeover).

Defendants base much of their argument on the holding in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert. den.* 414 US. 1045 (1973), which dismissed governmental plaintiffs who alleged that they had had to pay higher prices for cars because of defendants' antitrust violations.[2] In deciding that case the panel relied, as do defendants here, on *Hawaii v. Standard Oil of California,* 405 U.S. 251 (1972), in which the Supreme Court held that the State of Hawaii lacked standing to sue as *parens patriae* alleging damage to its economy caused by defendants' anticompetitive actions. Reliance on one phrase from that case, however, is misplaced. Although the Court did, as defendants claim, conclude that the words "business or property" "refer to commercial interests or enterprises," 405 U.S. 251 at 264, its interpretation of "commercial interests" clearly encompasses the interest of consumers who must pay more in the marketplace because of defendants' actions. 405 U.S. 251 at 262 fn. 14. The Court distinguished the State's interest in its general economic welfare from its proprietary interest as a consumer, and it suggested that under 15 U.S.C. § 15 (Clayton Act § 4) a state could in its proprietary capacity bring a class action as representative of its consumer citizens. 405 U.S. 251 at 266. In affirming dismissal of the *parens patriae* plaintiff, the Court contradicted the claim of defendants herein that plaintiffs must be in business to have standing under § 4.[3]

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[2] *See also State of California v. Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir. 1973), *cert. den.* 412 U.S. 908 (1973), in which the state's standing to sue as *parens patriae* on behalf of its consumer citizens was rejected. The Court accepted the claim of injury to the "business or property" of citizens but held that representation of these claimants was beyond the scope of the *parens patriae* doctrine.

[3] *See also Jeffrey v. Southwestern Bell, supra,* at 1130, fn.2, in which the Fifth Circuit, while refusing to decide the issue, acknowledged that the Supreme Court apparently had recognized the right of ordinary consumers to sue under § 4.

The Eighth Circuit decision in *Ragar v. T. J. Raney & Sons*, 521 F.2d 795 (1975), affirming the decision of Judge Henley in the Eastern District of Arkansas, 388 F. Supp. 1184 (1975), does not dispose of the issue. In that case, taxpayers sued investment bankers who allegedly conspired to fix the rate of interest to be paid on municipal bonds at a level higher than that which the city would have had to pay had the bidding not been "fixed." The district court, relying particularly on an Eighth Circuit decision that private citizens lack standing to sue on behalf of a municipality, stated that plaintiffs as property taxpayers neither suffered direct injury nor were within the "target area" of the conspiracy. *Ragar, supra*, at 1187. It went on to declare that plaintiffs did not assert, as they must, an injury to their business or competitive position. The Eighth Circuit affirmed "on the basis of the district court's soundly reasoned opinion." 521 F.2d 795 at 796.

In finding that plaintiffs could not allege injury to the required type of property interest, the district court relied on cases that preceded the Supreme Court's suggestion of consumer standing in *Hawaii v. Standard Oil, supra*. All were cases in which the plaintiffs were persons in business, and the existence or nonexistence of "competitive" injury was invoked only as a means of evaluating causality and remoteness of injury; none involved individual plaintiffs who were "injured in their property . . . by being led to pay more than the worth" of purchased goods. *Chattanooga Foundry v. Atlanta*, 203 US. 390 at 396 (1906). The *per curiam* affirmance in *Ragar, supra*, indicates only that the Circuit Court approved of at least one ground upon which the district court based its holding; it does not clearly indicate specific adoption of the position that a consumer cannot allege injury to "property" within the meaning of Clayton Act § 4.

As suggested by Justice Holmes in *Chattanooga Foundry, supra*, at 397, injury to "property" must mean "the money of the plaintiff." If the phrase "business or property" were interpreted to refer only to persons engaged in commercial activity, the term "property" would be rendered meaningless, for "business" and "commerce" are for all practical purposes and by common understanding identical. This Court cannot conclude that Congress included a meaningless term in this carefully considered legislation.

Defendants claim that the extensive legislative history of the Clayton Act supports their position. However, even Judge Williams, who recently decided that ordinary consumers lack standing under § 4, conceded that the statements made in congressional debate in 1890 and 1914 do not shed a great deal of light on the question. *Weinberg v. Federated Dept. Stores*, C-76-867 SW (N.D. Cal. Jan. 11, 1977), slip op. at 5. This Court acknowledges that discussion at the time primarily concerned the remedies that would be available to small businessmen rather than to retail consumers. *See*, for instance, 21 Cong. Rec. 3147 (1890) (Sen. George); 51 Cong. Rec. 9198 (1914) (Rep. Taggart). However, as recently as January 25, 1977, Justice Marshall suggested that Congress intended to include consumers among the persons entitled to sue under § 4. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 45 U.S.L.W. 4140 fn. 10 (Jan. 25, 1977).

Regardless of the conclusions one draws from a literal reading of the legislative history, the debates must be read in light of the knowledge and assumptions held by society in that period. *McBoyle v. United States*, 283 U.S. 25 at 26 (1930). In 1914, when the Clayton Act was passed to incorporate and extend the Sherman Act, "consumers" were not identifiable

as a constituency, and protection of their economic interests was an unknown concept. If they were not discussed at any great length during congressional consideration of the antitrust statutes, it is at least as probable that they did not exist in the minds of Congressmen as that they were deliberately ignored.

In his opinions dealing with this issue Judge Williams concludes that the recent amendments to the antitrust laws indicate a current congressional understanding that consumers lack standing to sue under § 4 and must be protected by a grant of standing to the states to sue as *parens patriae*. *See Weinberg v. Federated Dept. Stores, supra*, slip op. at 10; Antitrust Improvements Act, P.L. 94-435 (Sept. 30, 1976). The legislative history of these amendments, however, indicates the contrary: Congress felt that consumers were precluded from suing as a matter of practicality rather than of law.[4] The House report on H.R. 8532, which became P.L. 94-435, stated:

> "Under § 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual lawsuit by an injured consumer is, as a practical matter, out of the question." H. Rpt. 94-499, Sept. 22/Nov. 4, 1976, USCCAN 94th Cong. 2d Sess. (1976), p. 4057.

[4] To illustrate the difficulty in declaring unequivocally that Congress did or did not in 1890 or 1914 intend that individual consumers have standing, we note that during those extensive discussions of the plight of the small businessman, Sen. George remarked that a "consumer" overcharged by $25.00 on a commodity would have little incentive to sue because of the cost of litigation. 21 Cong. Rec. 1768 (1890). What he meant by "consumer" is a matter for sheer speculation.

The report cites the difficulty, expense, and unmanageability of massive class action litigation and concludes that the *parens patriae* method will serve the public interest in antitrust cases involving large numbers of injured consumers. At no time does it suggest that the legal remedy is a novel one, only that the method of pursuing it is new,

In congressional debate on this bill, Rep. Seiberling, who practiced antitrust law for seventeen years before election to Congress, indicated a similar understanding of consumer standing. "All this bill will do," he stated,

> "is provide a means to make more effective an existing procedural remedy which every consumer already has in theory, but which small consumers are in practice unable to exercise." 122 Cong. Rec.-House 2065 (daily ed., Mar. 18, 1976).

This Court will not now declare that antitrust remedies are not available to individual consumers "in theory."

The Court does agree with Congress that the remedy sought here may well be unavailable in fact. In passing on the standing question, the one raised on this motion, the Court expresses no opinion on the merits of the claims or the certifiability of a class.

IT IS ORDERED:

That defendants' motions be, and hereby are, denied.

/s/ EARL R. LARSON
United States District Judge

March 31, 1977.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1474

KATHLEEN R. REITER, Individually and as Representative of the Class of All Personal Users of Hearing Aids Located in the U.S.,

Appellee,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minn. corporation; TEXTRON, INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Submitted: October 14, 1977
Filed: June 19, 1978

Before BRIGHT, WEBSTER,* and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Plaintiff-appellee, Kathleen R. Reiter, commenced this class action for treble damages on May 2, 1975, against defendants-

* The Honorable William H. Webster participated in oral argument but took no part in the disposition of this appeal.

appellants, hearing aid manufacturers, under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). In her complaint, she alleged that these manufacturers by combining and conspiring to violate the antitrust laws had controlled their dealers' sales practices, particularly the price at which hearing aids ultimately would be sold to consumers.[1] Reiter brought the action for relief under the antitrust laws on behalf of herself and "all persons in the United States or any sub part thereof who directly or indirectly purchased * * * hearing aids [at the allegedly unlawful prices]."

The manufacturers moved for dismissal or, alternatively, for summary judgment arguing, *inter alia*, that as noncommercial consumers Kathleen Reiter and the class she sought to represent had not been injured in their "business or property" under section 4 of the Clayton Act. The district court, in a comprehensive memorandum opinion,[2] denied the manufacturers' motions but certified the issue of consumer standing as appropriate for interlocutory review under 28 U.SC. §1292 (b) (1970); we authorized the interlocutory appeal.

In this appeal, we are presented the narrow question whether a consumer who purchases a hearing aid for personal use at a higher price because of a manufacturer's allegedly anticompetitive activity suffers injury to business or property under section 4 of the Clayton Act. Section 4 provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United

[1] The complaint sought both monetary and injunctive relief.
[2] The district court opinion is reported at [1977] 1 Trade Cas. (CCH) ¶61, 360 (D. Minn. Mar. 31, 1977).

> States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C. § 15 (1976).]

We hold that such consumers are not injured in their "business or property" for purposes of section 4 and reverse the district court.[3]

I. *Legislative History.*

Section 4 of the Clayton Act was first codified in section 2 of the Sherman Act. The Sherman Act, promulgated in 1890, was a congressional reaction to the concentrations of economic power that emerged from the industrialism of the mid-nineteenth century. *See* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L.Rev. 570, 570 (1964). Declaring monopolies and restraints of trade illegal, congress sought "to free competition in business and commercial transactions * * *." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1939). The history of the Sherman Act, as evidenced in the legislative proceedings,[4] emphatically supports the conclusion that the Act was designed to prevent re-

[3] Appellees did not purchase their hearing aids directly from the manufacturers. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that only direct purchasers may sue for treble damages under § 4 of the Clayton Act. The Court recognized, however, that indirect purchasers may maintain actions involving cost-plus contracts as well as those "in which market forces have been superseded [as when] the direct purchaser is owned or controlled by its customer." *Id.* at 736 & n.16.

Appellees contend that the manufacturers in this case engaged in various prohibited vertical restraints including resale price maintenance. In view of our holding that ordinary consumers may not maintain treble damage actions, we need not decide whether appellants' alleged violations constitute an exception to *Illinois Brick*.

[4] For an exhaustive analysis of the Sherman Act's legislative history, see M. Forkosch, *Antitrust and the Consumer (Enforcement)* 32-170 (1956).

straints of trade significantly affecting business competition. *Id.* at 493 n.15.[5]

The legislative history underlying the provision permitting private damage actions, while voluminous and in parts illuminating, is less explicit. Courts and commentators have been unable to agree on the precise congressional intent.

As originally introduced by Senator Sherman in the Senate Finance Committee, the bill in section 2 broadly authorized damage actions by "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination * * *." S.1, 51st Cong., 1st Sess. § 2(1889). This original language was, however, completely revised by the Senate Judiciary Committee. The amended language, which became section, 7, limited treble damages to any

[5] An early resolution introduced on July 10, 1888, by Senator Sherman and passed without discussion directed the Senate Finance Committee to study the efficacy of curtailing "trusts or combinations * * * made with a view * * * to prevent *free and full competition* * * * with such penalties and provisions * * * as will tend to preserve freedom of trade and production [and] the natural competition of increasing production * * *." 19 Cong. Rec. 6041 (1888) (remarks of Sen. Sherman) (emphasis supplied). This resolution, which gave rise to the congressional debates and ultimately the Sherman Act, explicitly articulated the economic philosophy of the bill's proponents. The bills introduced between 1888 and 1890 are consistent with this approach. *See, e.g.*, S.3445, S.3510, and H.R. Rep. 11339, 50th Cong., 1st Sess. (1888) (arrangements that tend to prevent full and free competition in the production, manufacture, or sale of articles are void), *cited in Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493-94 n.15 (1939). The debates accompanying the final bill also stressed the importance of preserving competition and the need to proscribe those agreements, combinations, and trusts whose purpose was to destroy competition. *See generally* 21 Cong. Rec. 2457-2461 (1890) (remarks of Sen. Sherman); *id.* at 2558 (remarks of Sen. Pugh); *id.* at 2729 (remarks of Sen. Platt); *id.* at 3147 (remarks of Sen. George); *id.* at 4089 (remarks of Rep. Culberson).

The Supreme Court has noted this virtual unanimity of Congress in seeking to protect and preserve a free competitive environment. *See Apex Hosiery Co. v. Leader, supra*, 310 U.S. at 493-95 n.15.

person injured in his business or property by an antitrust violation. 21 Cong. Rec. 2901 (1890).

Congress failed to indicate explicity the rationale for limiting the injuries for which treble damage actions could be maintained. Senator Morgan, however, recognized the need to limit the breadth and scope of private actions.

> This bill ought not to be a breeder of lawsuits. If there is any one duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can. [21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan).]

The Supreme Court has noted that the legislative history is not very instructive in explaining the purpose for limiting recovery to business or property injuries. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). *See also* Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 Colum. L.Rev. 394, 396 n.15 (1972).

Despite its somewhat inconclusive explanation, however, we cannot ignore Congress' explicit rejection of the original Sherman bill's broad language in favor of the statute as enacted. While ordinary consumers arguably would have been included in if not encouraged by the bill as originally introduced, we think the statute as enacted was intended to limit the class of persons able to bring a private damage action. *See* 21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan).

Some members of Congress argued that the enacted provision containing the limiting language would be of little use to the average consumer. In fact, Senator George, recognizing that consumers would be virtually remediless with the statute as written, urged without success more effective remedies for consumers.

> [T]he poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion. [21 Cong. Rec. 3150 (1890) (remarks of Sen. George).][6]

See id. at 3147-48, 1767-68; *id.* at 2571 (remarks of Rep. Hiscock); *id.* at 2564 (remarks of Sen. Reagan). We note this congressional concern with the statute's inability to aid the consumer. We cannot, however, amend the Act to include that which Congress neglected or intentionally excluded. *Cf. Pfizer, Inc. v. Government of India*, 98 S.Ct. 584, 587 (1978) (resolution of section 4's meaning "turns on the interpretation of the statute").

In 1914, Congress enacted the Clayton Act. Section 7 of the Sherman Act became section 4 of the new statute and retained the "business or property" limitation. The Senate Report accompanying the Clayton Act indicates that Congress, by its enactment, did not intend to amend the Sherman Act. The report comments:

> This section, which gives any person injured by a violation of the antitrust acts the right to sue in the Federal courts for threefold the damages by him sustained * * * is not proposed to be amended in any particular. [S. Rep. No. 698, 63rd Cong., 2d Sess. 45 (1914).]

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[6] Senator George's remarks reflect the practical rather than theoretical obstacles to consumer actions because the mechanic or country merchant alleging a business or commercial injury would be able to sue for treble damages even if consumers failing to allege such injury could not.

Congress' principal concern in enacting the Clayton Act, as articulated in its comments accompanying the statute, was to provide a remedy to persons suffering a business injury as a result of combinations operating in restraint of trade. *See* 51 Cong. Rec. 9270 (1914) (remarks of Rep. Carlin). During the House debates, Representative Webb, a member of the Judiciary Committee, who explained the various statutory provisions, described section 4 (then section 5) as providing a treble damage cause of action to "any person * * * injured in his *business*, by reason of anything forbidden in the antitrust laws * * *." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb) (emphasis supplied). *See also* 51 Cong. Rec. 16,274 (1914) (remarks by Rep. Webb) (section 4 authorizes suits by a *business* man).

Representative Taggart, a member of the House Finance Committee, emphasized the commercial nature of the injury for which Congress intended to provide relief.

> A great many suits have been brought against trusts [that] have been dissolved. Some few have been punished, put the people whose business they destroyed have been practically without a remedy. When this bill becomes a law, the person who willfully destroys another person's business will do so at his peril.
>
> The bill is framed for the purpose of liberating *business* and not for the purpose of injuring or destroying any *business. Its great purpose is to protect small business from big business*, and to compel all business to be conducted honestly. [51 Cong. Reg. 9198 (1914) (remarks of Rep. Taggart) (emphasis supplied).]

Senator Reed similarly identified business as the primary interest protected by the statute.

> It follows that the Argus eyes of thousands of business men now being injured will be upon the powerful concerns, and the thousand arms of the courts will be employed to prevent their evil practices. [51 Cong. Rec. 12,939 (1914) (remarks of Sen. Reed).]

Moreover, in section 16 the Clayton Act permits injunctive relief to "[a]ny person * * * threatened [with] loss or damage by a violation of the antitrust laws * * *." 15 U.S.C. § 26 (1976). This rather broad provision does not contain section 4's business or property limitation.[7] We think Congress, in considering this carefully drafted statute, contemplated the modes of relief that, consistent with the Act's purposes, would most effectively protect the various interests in the economy.

In sum, the legislative history indicates a congressional awareness that the antitrust laws would benefit the small business owner but would be of little value to the ordinary consumer.[8]

II. *Judicial Decisions—"Business or Property."*

The meaning and scope of "business or property" in section 4 have generally been discussed by the courts in contexts other

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[7] The Supreme Court has recognized that these two sections are "notably different." *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972) (comparing "business or property" requirement of § 4 with "threatened loss or damage" requirement of § 16); *cf. Calnetics Corp. v. Volkswagon of America, Inc.*, 348 F. Supp. 606 (C.D. Cal. 1972), *modified*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (plaintiff entitled to injunctive relief despite failure to prove causal connection necessary to support claim for damages).

[8] In contrast, the Supreme Court acknowledged in *Pfizer, Inc. v. Government of India*, 98 S.Ct. 584 (1978): "It seems apparent * * * the question [whether foreign nations are entitled to sue for treble damages under § 4 of the Clayton Act] was never considered at the time the Sherman and Clayton Acts were enacted." *Id.* at 587.

than consumer standing.[9] There has been some recognition that an injury to property is different and, perhaps, broader than a business injury.[10] *See generally* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570, 577-78 (1964).

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[9] Independent of the consumer standing issue, the United States appellate courts have narrowed the class of persons able to seek treble damages for antitrust violations by employing a causation analysis similar to the proximate cause limitation contained in tort law. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting). The right to recover in the Ninth, Fifth, Fourth, and Second Circuits is limited to those in the "target area" of the alleged violative activity. *See, e.g., Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 800-01 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (U.S. Nov. 1, 1977); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 128-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966). The Third Circuit has narrowed standing to those plaintiffs suffering a "direct injury". *See Bravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 96-97 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (U.S. Oct. 4, 1977). The Sixth Circuit has examined whether the plaintiff was in the "protected zone of interest." *See Malamud v, Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975), *citing Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). This circuit has required an "injury * * * something more than remote * * *." *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 689 (8th Cir. 1966).

[10] In *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D. N.Y. 1964), the court noted the distinction between business and property. The plaintiff in that case had entered into a contract that would have given him oil importation rights. He was alleging that an illegal conspiracy prevented his importation of the oil. Because his enterprise was only potential, the court found that no "business" within the meaning of the Act existed. The court went on to decide, however, that the statute uses the two terms in the disjunctive; § 4 as it is written is broader than just business. "The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.' " *Id.* at 86. Under this conception, property is any legally protected interest. *Id.*

This distinction was also noted in *Hamman v. United States*, 267 F. Supp. 420 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968), cited with approval in *Hawaii v. Standard Oil Co., supra*, 405 U.S. at 264. There, damages were sought for the death of a workman who had been killed during the construction of a dam. In one count, plaintiff alleged that: (1) an illegal conspiracy in restraint of trade had prevented other, more careful construction companies from bidding on the job; (2) defendant's failure to exercise reasonable care had caused decedent's death; thus, (3) plaintiff who had suffered loss of consortium, a recognized property interest under state law, had been injured in her property under § 4 of the Clayton Act. The court, citing *Waldron, supra*, stated that "property" in § 4, is broader than business, but that an injury to business or property requires "a commercial venture or enterprise." 267 F. Supp. at 432. The court dismissed the count on the ground that, while plaintiff had suffered an injury to property under state law, she had not suffered an injury to the types of property "protected * * * by the antitrust laws." *Id.* The court also stressed the absence of proximate cause between the injury and the alleged wrongful conduct. *See* n.9 *supra*.

In *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396, 399 (1906), the Court, through Mr. Justice Holmes, discussed "business or property".

> The facts gave rise to a cause of action under the Act of Congress. * * * [The City] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.
> * * * *
> A man is injured in his property when his property is diminished.

On its face, the Court's language suggests that consumers forced to pay more for a product by virtue of anticompetitive activity suffer injury to their property. The City of Atlanta, however, had commenced the action against two companies that allegedly had combined to keep the price of iron water pipe artificially high. As a result, the cost to the city of supplying water to its residents was increased. Thus, the city's claim arguably sought recovery for a business injury.

Neither the Supreme Court nor a federal appellate court has specifically addressed whether ordinary consumers who purchase a product for personal use at a higher price because of anticompetitive activity suffer an injury to property under section 4 of the Clayton Act.[11] The Supreme Court has intimated that such injury, in order to be legally cognizable, must be of a commercial nature.

> Like the lower courts that have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises. [*Hawaii v. Standard Oil Co., supra,* 405 U.S. at 264 (1972).]

In *Hawaii,* the state had brought a *parens patriae* action on behalf of its citizens as the representative of a class of all purchasers in the state. The Court denied standing to the state to sue for injuries to the general economy.

> When the State seeks damages for injuries to its *commercial interests,* it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act. [*Id.* (emphasis supplied).][12]

This circuit has approved language suggesting that, in order to be recoverable, the injury to "business or property" must be a competitive one. *See Ragar v. T. J. Raney & Sons,*

[11] A trilogy of cases recently decided by Judge Williams in the Northern District of California has been consolidated and is currently before the Ninth Circuit. In all three cases, Judge Williams held that consumers purchasing products for personal use suffer no injury to business or property under § 4 and may not bring treble damage actions for relief. *See Weinberg v. Federated Department Stores,* 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez v. E. & J. Gallo Winery Co.,* 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith v. Toyota Motor Sales U.S.A., Inc,* No. 75-0727 (N.D. Cal. Jan. 11, 1977), *appeals docketed,* Nos. 77-1845, 77-1724, 77-1725, 77-1850, 77-1851, 77-1852 (9th Cir. 1977). Judge Williams analyzed the legislative history of the statute, relying upon the change in the section's language, the fear of a proliferation of lawsuits, and statements in the congressional debates extolling the benefits of the Act to businessmen. He also examined language in several court decisions, including *Hawaii v. Standard Oil Co., supra,* and *Ragar v. T. J. Raney & Sons,* 388 F. Supp. 1184 (E.D. Ark.), *aff'd,* 521 F.2d 795 (8th Cir. 1975) (*per curiam*), *see* p. 13 *infra,* and concluded that the phrase "business or property" cannot be read in the disjunctive but "is a conjunctive reference to interests of a business nature." *Gutierrez v. E. & J. Gallo Winery Co., supra,* 425 F. Supp. at 1225. Therefore, consumers who alleged no injury to a business enterprise were held to be without standing to sue.

[12] The Court did not, however, define commercial interest and, in a footnote, distinguished an injury suffered by the state in its capacity as a "consumer in the marketplace," which is within the scope of § 4's protection, from that occurring merely to the state's general economy, which is not. *Hawaii v. Standard Oil Co., supra,* 405 U.S. at 262-63 n.14. Similarly, in explaining a provision enabling the United States to sue for antitrust violations that is also limited to injuries to business or property, the Court stated the provision was not intended to cover general injuries to the national economy, "but only * * * those * * * suffered * * * as a consumer of goods and services." *Id.* at 265. The Court also noted that a large part of any injury to the state's general economy "is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." *Id.* at 264.

In addition to this language by the Court in *Hawaii,* appellee cites, and we note, several judicial references, some by the Supreme Court, suggesting that "consumers in the marketplace" should be permitted redress for injuries suffered through anticompetitive actvity. *See, e.g., Pfizer, Inc. v. Government of India,* 98 S.Ct. 584, 592, 594 (Burger, C.J., dissenting) (1978); *Brunswick v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 n.10 (1977). In *Cleary v. Chalk,* 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 938 (1974), the court, acknowledging that the phrase "business or property" refers to commercial interests or enterprises, stated: "We have no doubt that a consumer of service who is illegally overcharged sustains a property injury no less than a consumer of goods." Relying upon *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, 396 (1906), the court indicated that a consumer of goods is injured in his property by violations of the antitrust laws that raise the price of goods. In *Bravman v. Bassett Furniture Industries, Inc., supra,* a suit by a sales representative of a furniture manufacturer, the court stated: "The right of consumers to challenge price fixing conspiracies is well established." 552 F.2d at 99 n.23.

These references, however, are not inconsistent with our construction of § 4. Consumers who suffer commercial injury to business or property may sue for treble damages. Moreover, the consumer standing question presented in this appeal was not addressed by these courts. *See* n.18 *infra.*

388 F. Supp. 1184, 1187 (E.D. Ark.), *aff'd*, 521 F.2d 795 (8th Cir. 1975) *(per curiam)*. *Ragar* involved an antitrust action by property owners against investment banking firms who had conspired to keep interest rates on municipal bonds higher than they otherwise would have been. The district court, finding that plaintiff's injury was remotely related to the alleged violation, held that plaintiffs lacked standing to sue. Alternatively, the court said the plaintiffs had not been injured in their "business or property" because that phrase requires a competitive injury.

> Since the purpose of the antitrust laws is the "prevention of restraints to free competition in business and commercial transactions," * * * it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act. [368 F. Supp. at 1187.]

Other circuits have similarly suggested that section 4 requires a competitive or commercial injury. In *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973), one company alleged that another company was attempting a takeover in order to monopolize the industry. The court, concluding that the policy favored by the Act is competition, sustained the district court's dismissal of the complaint for failure to state a claim.

> The Supreme Court has consistently reiterated that "[t]he Sherman Act was * * * aimed at preserving free and unfettered *competition* as the rule of trade," and that "the policy unequivocally laid down by the Act is competition." * * * The courts, in interpreting § 4 of the Clayton Act and its predecessor, have endeavored, although with some inconsistency and conflict, to promote the policy of competition established by the Sherman and Clayton Acts by interpreting § 4 as allowing treble damages only to those who have suffered some diminution of their ability to compete. Whether viewed in terms of "lack of standing" or the absence of *antitrust* damages, the courts, in denying recovery to various kinds of plaintiffs, have sought to confine recovery to those who have been injured by restraints on competitive forces in the economy.
>
> Not all persons who may be able to trace an economic loss to a violation of the antitrust laws can recover under those laws. The Supreme Court has stated that, in determining who may sue under § 4, the central question is one of *competitive injury*. [*Id.* at 757-58 (emphasis in original).][13]

In *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), the Ninth Circuit, citing *Hawaii v. Standard Oil Co., supra*, also expressed the view that the phrase "business or property" limits standing to those engaged in commercial ventures and enterprises. 481 F.2d at 131. *See also Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1175 (5th Cir. 1976) (in

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[13] *But see Pfizer, Inc. v. Government of India, supra*, 98 S.Ct. at 588, *citing Illinois Brick Co. v. Illinois, supra*. In *Pfizer*, the Court noted that "§ 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.'"

This reference by the Court to the compensatory rationale of § 4 was designed merely to emphasize its remedial function. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 485. The Court has repeatedly stressed as the general purpose of the antitrust laws the need to enhance competition. *See Hawaii v. Standard Oil Co., supra*, 405 U.S. at 262; *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *Apex Hosiery Co. v. Leader, supra*, 310 U.S. at 493.

order to be cognizable under section 4, the injury must be to commercial interests or enterprises) *cf. Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (in order to satisfy section 4's business or property prerequisite, fired worker must demonstrate that "his job [was] a commercial venture or enterprise").

Our review of the cases convinces us that the few courts specifically addressing the question have recognized that section 4 requires a commercial or competitive injury.

III. *Antitrust Improvements Act of 1976.*

In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act. The new statute permits "State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws." H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2572. Congress intended in the new Act "to provide a remedy for injured consumers." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 756-57 (1977) (Brennan, J., dissenting). This Act represents a congressional response to the holding of *Hawaii v. Standard Oil Co., supra* (Clayton Act does not authorize a state to sue on behalf of its citizens for injury to its general economy). *See Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 756 (Brennan, J., dissenting).

According to the Act's legislative history, some members of Congress assumed, contrary to our construction of the statute, that ordinary consumers may currently sue for treble damages under section 4.[14] As the Supreme Court has noted,

[14] *See, e.g.*, 122 Cong. Rec. 2065 (daily ed. Mar. 18, 1976) (remarks of Rep. Seiberling). *See generally* H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 3-9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2572-78.

however, Congress made clear that the new legislation did not alter the definition of injured persons under section 4, *see Illinois Brick Co. v. Illinois, supra*, 431 U.S. 720 at 733-34 n.14, and the House Judiciary Committee acknowledged that the bill did not create new substantive liability. H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2578. "The views expressed by particular legislators * * * cannot * * * change the legislative intent [of section 4] * * * 'since the statements were [made] after passage of the [Clayton] Act.'" *Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 733-34 n.14.

In the House Report accompanying the bill, the Judiciary Committee noted:

> The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. * * *
>
> Frequently, antitrust violations injure thousands or even millions of consumers, each in relatively small amounts. * * *
>
> Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. * * * [This bill] fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general. [H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2573-74.]

The Senate Judiciary Committee also noted that, in light of previously recognized judicial limitations, consumers had not been permitted to maintain antitrust actions.

> [The new act] is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to [class action] manageability * * * *Standing, privity, target area, remoteness, and the like.* [*Illinois Brick Co. v. Illinois, supra,* 431 U.S. at 757, *citing* S. Rep. No. 94-803, 94th Cong., 2d Sess. 42 (1976) (emphasis in original).]

We think it significant that Congress, which sought to provide a meaningful remedy for consumers in the 1976 Act, did not seek to improve, clarify, or alter any existing private right of action for ordinary consumers. Congress did comment on the inappropriateness of the class action as a means of redressing consumers who pay higher prices because of anticompetitive activity. See H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2576-77.

The goals and purposes of the antitrust laws may not be enhanced by permitting gigantic consumer class actions, many of which are never tried. In Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach,* 85 Yale L.J. 626, 627-30 (1976), the authors point out the failure to date, of the class action vehicle to compensate aggrieved consumers. Judge Medina, of the Second Circuit, has noted: "not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits." *Eisen v. Carlisle & Jaquelin,* 479 F.2d 1005, 1018-19 (2d Cir. 1973), *aff'd,* 417 U.S. 156 (1974).[15]

[15] In our own circuit we have had an opportunity to review a grand scale antitrust class action in various contexts. *See United States v. Pfizer, Inc.,* 560 F.2d 323 (8th Cir. 1977); *United States v. Pfizer, Inc.,* 560 F.2d 319 (8th Cir. 1977); *Republic of Vietnam v. Pfizer, Inc.,* 556 F.2d 892 (8th Cir. 1977); *Pfizer, Inc. v. Government of India,* 550 F.2d 396 (8th Cir.), *aff'd en banc,* 550 F.2d 400 (1976), *aff'd,* 98 S.Ct. 584 (1978); *United States v. Lord,* 542 F.2d 719 (8th Cir. 1976); *Pfizer, Inc. v. International Rectifier Corp.,* 538 F.2d 180 (8th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); *Pfizer, Inc. v. International Rectifier Corp.,* Nos. 75-1089 & 75-1187 (8th Cir. Mar. 26, 1975); *Pfizer, Inc. v. Lord,* 522 F.2d 612 (8th Cir. 1975), *cert. denied,* 424 U.S. 950 (1976); *In re Fish & Neave,* 519 F.2d 116 (8th Cir. 1975); *Pfizer, Inc. v. International Rectifier Corp.,* No. 74-1425 (8th Cir. July 26, 1974); *Pfizer Inc. v. Lord,* 456 F.2d 545 (8th Cir. 1972); *Pfizer Inc. v. Lord,* 456 F.2d 532 (8th Cir.), *cert. denied,* 406 U.S. 976 (1972). It is our understanding that the merits in that case have never fully litigated.

Often, defendants who are unwilling or unable to defend such suits are compelled for economic reasons to settle actions otherwise meritless. The result of such settlements will inevitably be counterproductive when the costs to the defendant of defense and settlement are passed on to present and future consumers. Moreover, big firms are better able than small or medium-sized businesses to defend or settle such claims under similar circumstances. The ultimate result might be to preserve an oligopolistic economic climate. The deterrent impact of such suits, in our view, does not outweigh their potentially ruinous effect on American business. Deterrence exists in other antitrust remedies[16] as well as in the 1976 Act, which places responsibility for consumer actions upon state attorneys general. We agree with Congress that the new statute will effectively protect the interests of consumers without imposing upon the courts and the economy the risk and burden of nonmeritorious class actions.[17]

[16] In addition to the new statute, the Justice Department's antitrust division as well as the Federal Trade Commission are empowered to combat anticompetittive activity.

[17] We, of course, intimate no view on the merits of the present action.

IV. *Conclusion.*

In sum the broad purposes of the Sherman and Clayton Acts were to provide an appropriate and *effective* remedy and to assure and protect competitive enterprise. The statutes primarily emphasized enforcement by businesses particularly small businesses against predators. We cannot ignore Congress' rejection of the broad language in the original Sherman Act in favor of the "business or property" limitation of the statute as enacted. We are also mindful of the congressional concern that consumers would be virtually without a remedy. We believe in light of the statutory history that Congress did not legislate in a vacuum. While the Act neither defines nor explains business or property we think the overall purpose of the antitrust laws to enhance competition *see Hawaii v. Standard Oil Co., supra,* 405 U.S. at 262; *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962); *Apex Hosiery Co. v. Leaders, supra,* 310 U.S. at 493 will best be served by requiring a commercial injury before a person may invoke the treble damage provisions of section 4.[18]

For the foregoing reasons we think it sensible as a matter of policy and compelled as a matter of law that consumers alleging no injury of a commercial or competitive nature are

[18] Appellees argue that numerous consumer actions have been permitted by the courts, many to completion, without any discussion of consumer standing. For example, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), purchasers of homes successfully attacked attorneys' use of minimum fee schedules. The Supreme Court, while noting that this type of activity harmed consumers, *id.* at 782, did not specifically discuss consumer standing. *See also Fisher v. First National Bank of Omaha,* 548 F.2d 255 (8th Cir. 1977) (failing to address consumer standing, court dismissed action on other grounds).

In these cases, however, the issue was neither raised by the parties nor addressed by the courts; as such, it cannot be deemed to have been decided.

not injured in their property under section 4 of the Clayton Act.[19]

Reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Caption)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Filed: August 11, 1978

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc in the above case is denied by four of the judges voting in favor of the denial. Three of the judges vote in favor of the rehearing en banc.

Lay, Circuit Judge, joined by Heaney and Stephenson, would grant the petition for rehearing en banc for the following reasons:

The panel's decision denying standing to an individual consumer under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), is contrary to the rationale of *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906) and *Pfizer Inc.*

[19] Appellee's complaint in the district court sought both monetary and injunctive relief. She is precluded by our decision from maintaining an action for treble damages under §4. Her claim for injunctive relief, however, is not before us in this interlocutory appeal.

v. Government of India, 98 S.Ct. 584 (1978). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 n.10 (1977). The decision is also contrary to several lower federal court decisions. *See Cleary v. Chalk*, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D. N.Y. 1978); *DeGregorio v. Segal*, 443 F. Supp. 1257, 1260-61 (E.D. Pa. 1978); *In re Petroleum Products Antitrust Litigation*, 1977-2 Trade Cases (CCH) ¶61,639 (C.D., Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation*, 1977-1 Trade Cases (CCH) ¶61,434 (D. D.C. May 17, 1977). *See also* L. Sullivan, Antitrust 771 n.3 (1977). The denial of standing to an individual consumer reduces to a nullity the parens patriae provisions of the Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15c-15h (Supp. 1978), which authorize state attorneys general to bring actions on behalf of natural citizens for *non-business* injuries.[1] We also join in the government's criticism contained in its amicus curiae brief in support of plaintiff's petition for rehearing:

> The panel opinion (sl. op. 18-19) appears to have been influenced significantly by the belief that consumer class actions seeking treble damages are anti-competitive. It asserts that such suits are meritless, yet exact unfair settlements from defendants, especially small businesses, that are unable to bear the costs of a defense. It thus concludes that any pro-competitive impact of these treble damage suits are outweighed by their entrenchment of large enterprises and their potentially ruinous effect on

[1] Subsequent legislation indicating the intent of an earlier statute is entitled to great weight in statutory construction. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

> American small business. The panel's decision, however, reaches beyond its proffered concerns. It excludes all consumer treble damage actions brought under Section 4, not just class action suits. More importantly, it represents a policy judgment beyond the province of the judiciary. The courts are not free to interpret statutory language to support their views of wise economic policy. It is Congress' policy choice which must be implemented and the panel decision frustrates rather than effectuates the Congressional will.

Brief for Government at 9-10.

For the foregoing reasons and those succinctly stated by Judge Larson in his memorandum opinion below, we would grant the petition for rehearing.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court, U. S.
FILED
OCT 30 1978
MICHAEL RODAK, JR., CLERK

No. 78-690

In the Supreme Court of the United States

OCTOBER TERM, 1978

KATHLEEN R. REITER, PETITIONER

v.

SONOTONE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Private actions for damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, have served an important role, supplemental to that of public actions, in enforcing the antitrust laws. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). The United States therefore has an interest in preserving the effectiveness of private actions, and it has participated as

amicus curiae in many private antitrust cases that this Court has considered in recent years. See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952, argued October 11, 1978.

The United States has a special interest in this case because Section 4A of the Clayton Act, 15 U.S.C. 15a, gives the United States a right to recover the actual damages it suffers as a result of violations of the antitrust laws. The United States purchases, as consumer, substantial quantities of goods. In these cases the United States stands in the same relation to any price fixer as petitioner stands to the persons from whom she buys, and the adoption of the court of appeals' position therefore would restrict the right of the United States to recover for loss caused by overcharges made by sellers.

QUESTION PRESENTED

Whether consumers who pay higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15.

STATEMENT

Petitioner commenced this suit on behalf of a class seeking treble damages from respondents, five hearing aid manufacturers, under Section 4 of the Clayton

Act, 15 U.S.C. 15.[1] The complaint alleged that these manufacturers had committed a variety of antitrust violations that damaged petitioner and members of her class by causing them to pay higher prices for hearing aids and services than would have prevailed in a competitive marketplace.[2] Respondents argued that petitioner and the class have no treble damages remedy under Section 4 because they have not alleged that they were injured in their business or commercial interests.[3]

The district court rejected respondents' argument. It pointed out that Section 4 confers a right of action on persons injured in their "business or property" and that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), established that "property" includes "the money of the plaintiff" (Pet. App. A-9). The term "property" would be redundant, the district court reasoned, if it embraced only commercial interests (*ibid.*). The court also observed that the legislative history of Section 4 de-

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[1] Petitioner seeks to represent a class of all persons in the United States who have purchased hearing aids at prices affected by the alleged antitrust violations. No decision on the propriety of this broadly defined class has been made.

[2] The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and of Section 3 of the Clayton Act, 15 U.S.C. 14. The complaint essentially challenges constraints the manufacturers allegedly placed on dealers in the distribution and sale of hearing aids.

[3] Respondents also argued that the alleged injuries were too remote from the antitrust violations to confer standing to sue for damages under Section 4. This issue was not reached in the court below.

scribed in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), indicated that Congress intended to give a treble damages remedy to retail consumers. A requirement that plaintiffs establish injury to a commercial or business interest as a prerequisite to suit would frustrate this intent, the court reasoned (*id.* at A-9 to A-11).

The district court certified the case for an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals reversed (579 F. 2d 1077; Pet. App. A-12 to A-31). It held that consumers who allege "no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act" (*id.* at A-30 to A-31) and therefore may not recover damages for antitrust violations.[4] The court of appeals relied on certain legislative history, the perceived absence of a square holding to the contrary by this Court or a court of appeals, and its belief that many "gigantic consumer class actions" are anticompetitive and might be used to exact unfair settlements from small or medium

[4] The court of appeals declined to address the question whether petitioner's treble damage action is foreclosed by the direct purchaser requirement of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (Pet. App. A-14 n.3). Petitioner contended in the court below that this case fell within an exception to the direct purchaser requirement described in *Illinois Brick*. See 431 U.S. at 736 n. 16. The district court described petitioner as "the classic consumer plaintiff" (Pet. App. A-3) because the complaint alleges a conspiracy to affect the retail price of a consumer product on which plaintiff relies.

sized businesses and thereby "preserve an oligopolistic economic climate" (*id.* at A-28, A-29).

A petition for rehearing en banc was denied by a vote of 4 to 3. The three dissenting judges stated that the panel decision conflicted with the rationale of this Court's decisions in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, and *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), effectively nullified the parens patriae provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h, and was an improper substitution of judicial policy for the legislative view of the desirability of treble damages actions (Pet. App. A-31 to A-33).

ARGUMENT

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that persons injured in their "business or property" because of violations of the antitrust laws may recover treble damages. This Court long ago concluded that the use of the disjunctive in the statute is significant and that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property" within the meaning of Section 4. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906). The courts of appeals have followed this approach to Section 4 and have held that consumers of products are injured in their "property" when they pay higher prices attributable to antitrust violations. See, *e.g.*, *Cleary* v. *Chalk*, 488 F. 2d 1315, 1319 n.17 (D.C.

Cir. 1973), cert. denied, 416 U.S. 938 (1974).[5] Many cases have reached the conclusion implicitly, granting recovery to consumer-purchasers without considering the scope of Section 4. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 782 (1975). Two eminent scholars have concluded that "property" includes the interest of an overcharged consumer. 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 334b, 337a (1978).

The decision of the court of appeals here thus is a departure from a long tradition of cases allowing consumers to recover damages for antitrust injuries inflicted directly on them. It turns the statutory requirement of injury to "business or property" into a requirement of injury to "business property" by holding that no one can recover without proving "injury of a commercial or competitive nature" (Pet. App. A-30). The United States believes that the decision of the court of appeals is wrong and would seriously undercut the effectiveness of antitrust enforcement. Because of its importance, and because of the disagreement now prevailing among the federal courts, this Court should grant review.[6]

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[5] See also, *e.g.*, *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F. 2d 90, 98-99 & n.23 (3d Cir.), cert. denied, 434 U.S. 823 (1977); *DeGregorio* v. *Segal*, 443 F. Supp. 1257, 1260-1261 (E.D. Pa. 1978); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation*, 1977-1 Trade Cas. ¶ 61,434 (D. D. C. May 17, 1977).

[6] The same question is pending before two other courts of appeals. See *Theophil* v. *Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D.N.Y. 1978), appeal docketed, No. 78-7389 (2d Cir. 1978) (consumers may recover); *Weinberg* v. *Federated Department Stores, Inc.*, 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez* v. *E. & J. Gallo Winery Co.*, 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith* v. *Toyota Motor Sales U.S.A., Inc.*, No. 75-0727 (N.D. Cal. Jan. 11, 1977), appeals in all three cases docketed, Nos. 77-1724, 1725, 1845, 1850-1852 (9th Cir.) (consumers may not recover).

1. Consumer welfare is a primary purpose of the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977).[7] In any ordinary sense a consumer is injured in his "property" when a conspiracy in restraint of trade forces him to part with more money than competitive forces would require. In the case of a conspiracy among retailers, the consumer is the *only* direct victim.[8] And the consumer's injury in such cases is unquestionably "antitrust injury" in the sense that it flows directly from conduct that the antitrust laws were intended to prevent, for his benefit. It would therefore be extraordinary if a consumer injured by a conspiracy among retailers has no remedy. Yet that is what the court of appeals held here. In so doing it disregarded principles established by this Court.

Chattanooga was a suit by a municipality against a supplier of pipe. The City used the pipe in its waterworks. The defendant argued that the City had not been injured in its "business or property,"

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[7] See generally R. Bork, *The Antitrust Paradox* 50-89 (1978); 1 P. Areeda & D. Turner, *supra* at ¶¶ 103-113.

[8] The importance of ensuring competition in this market can scarcely be overstated. Expenditures for personal (nonbusiness) consumption exceeded $1.2 trillion last year (*1978 Economic Report of the President* 257, Table B-1), and most of these expenditures involved retail purchases.

but this Court disagreed. Instead of deciding the case on the ground that the City had been injured in its "business" of supplying water, the Court concluded that the City had been injured in its "property" by being overcharged. See 203 U.S. at 396-397.

The Court has since held that foreign governments may recover treble damages for overcharges that affect them as consumers, and it remarked that the statute gives a remedy to "all who are made victims of the forbidden practices." *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 (1978), quoting from *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). See also *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972) (citing *Chattanooga* for the proposition that consumers who are overcharged are injured in their property);[9] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (in distinguishing between direct purchasers, who can recover under Section 4, and indirect purchasers, who cannot, the Court assumed that consumers could recover); *Hanover Shoe Inc.* v. *United Shoe Machinery*, 392 U.S. 481, 489-490 (1968) (explaining that an overcharged buyer is injured in his property under Section 4, and relying on *Chattanooga*).

[9] The Court also referred in a general way to "injuries to the 'business or property' of consumers" (*id.* at 264). Although the Court then remarked (*ibid.*) that "business or property" refers to "commercial interests or enterprises," it did not mean this to exclude the interests of the very "consumers" to which it had just referred. The Court made the remark only as part of an explanation why Section 4 does not authorize recovery for injuries to the economy at large.

The court of appeals explained these and other cases as holding only that businessmen are injured in their "property" when they are overcharged as consumers. Thus *Chattanooga*, the court of appeals asserted, is a case in which the City was injured, in its property, in the course of its business of providing City services. The distinction will not wash. *Chattanooga* was not decided on that ground, and, at all events, the court of appeals' treatment of it makes the distinction between "business" and "property" vanish. There would have been no need for the Court to identify a loss to "property" in *Chattanooga* if the dispositive fact was an injury to the City's "business" of providing water to its residents.

2. Section 4 was designed to serve two principal purposes—to compensate the victims of an antitrust violation and to deter future violations by making them costly. *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 746. The legislative history of Section 4, discussed in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, demonstrates that Congress intended to make compensation available to identifiable victims of "antitrust injury," a class that includes consumers.

The court of appeals, however, invoked two arguments from the legislative history in an attempt to establish that Section 4 does not protect consumers.

The court first pointed out that the portion of the statute authorizing treble damages originally had spoken of remedies for "any person or corporation" injured by an antitrust violation, and that Congress had changed this language to the present reference to

"[a]ny person * * * injured in his business or property" (Pet. App. A-15 to A-17). The court thought that this suggested an intent to restrict recoveries to business injuries, and it fortified this inference with the statements of opponents of the legislation who prophesied that the change in language would leave consumers unprotected (*id.* at A-16 to A-17). But the change in language does not suggest an intent to restrict recoveries to business injuries; if that were Congress' intent, it would have said simply that a person injured "in his business" may recover damages.[10] The restriction to "business or property" injury is more naturally read as a requirement that the injury be proximate and concrete. See generally 2 P. Areeda & D. Turner, *supra*, at ¶¶ 334-342. That is, injuries to reputation, remote injuries, injuries to the general economy, and injuries that do not flow from a restriction of competition are outside the scope of Section 4 (see *Illinois Brick Co., supra; Brunswick Corp, supra*), but direct injuries to the victim's pocketbook are compensible. The court of appeals' reliance on hyperbolic statements of opponents of the legislation was unwarranted; such statements are entitled to little weight (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976)),

[10] In other words, the court of appeals' interpretation of Section 4 deprives the words "or property" of all meaning. It therefore collides with the principle that words in statutes should be given meaning unless that would lead to absurd or unintended results. *FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 11; *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

especially where, as here, the proponents of the bill rejected them as groundless and stated their intent to give a remedy to consumers.[11]

The court of appeals' second argument from the legislative history was based on statements pervading the consideration of the bill that Congress intended to provide a remedy to those suffering business injury (Pet. App. A-18 to A-19). There is no doubt that Congress intended to offer protection to persons injured in their business. But statutes often have more than one purpose, and nothing in any of the debates to which the court of appeals referred indicates that the protection of business was the *sole* purpose of Section 4. Its language, and the statements of its supporters (see note 11, *supra*), indicate that it was not so limited.

The court of appeals appears to have been influenced by a belief that class actions by consumers seeking to recover for injuries caused by antitrust violations are themselves anticompetitive. The court asserted that such suits are meritless but that they inflict substantial injury on defendants, especially on small businesses (Pet. App. A-28 to A-30). This argu-

[11] See, *e.g.*, 21 Cong. Rec. 2564 (1890) (remarks of Sens. Sherman and Reagan); *id.* at 2569 (remarks of Sen. Sherman); *id.* at 2571 (remarks of Sen. Teller and Rep. Hiscock). As this Court has emphasized, the treble damage action was "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' *especially consumers*," thus "opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 486 n. 10 (emphasis added.)

ment is difficult to accept; it entails the proposition that consumer suits such as *Goldfarb* v. *Virginia State Bar*, *supra*, are "meritless" and inflict injury on competition. The court's conclusion also reached far beyond the scope of its own argument: the court banned all consumer suits, not simply large class suits against small businesses. The more fundamental objection to the court of appeals' argument, however, is that the judicial branch is not authorized to substitute its judgment for that of Congress concerning the appropriate way to enforce the antitrust laws. *National Society of Professional Engineers* v. *United States*, No. 76-1767 (April 25, 1978), slip op. 12; cf. *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 38-40. Congress has authorized both class actions and suits by persons injured in their "property"; the fact that, in the court of appeals' view, some plaintiffs bring meritless suits is irrelevant.

3. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a), authorizes state attorneys general to bring civil actions to obtain monetary relief on behalf of natural persons injured in their property by violations of the Sherman Act. It creates no new substantive cause of action, but rather authorizes suits by attorneys general as one device for aggregating and litigating claims proper under Section 4 (see *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14). Title III does not allow recovery on behalf of any business entity; recovery is limited to injured consumers. Consequently, if the court of appeals' decision denying

consumers a right of recovery is upheld, the new legislation is nullified.

Congress expected Title III to afford relief to consumers by overcoming the practical difficulties to bringing class action suits.[12] The legislation is absolutely pointless if consumers have no right to seek damages.[13] Although the enactment of Title III did not create any new right of recovery, it surely demonstrates the almost universal understanding that consumers are entitled to recover under Section 4. See *Califano* v. *Sanders*, 430 U.S. 99 (1977) (drawing on 1976 amendment to demonstrate the understanding of Congress about the meaning of a 1948 statute). That the court of appeals' holding cuts against the views of a recent Congress, and frustrates the effectiveness of recent legislation, is still a further reason why the Court should grant review.

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[12] See, *e.g.*, H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 3-8 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 8-10, 39-42 (1976).

[13] The court of appeals assumed that its decision would not foreclose parens patriae actions under Title III (Pet. App. A-29). But because Title III authorizes only collective actions on behalf of persons entitled to recover under Section 4, and because Title III forbids collective actions on behalf of businesses, the court of appeals' assumption is unsupported. A holding that consumers have no rights under Section 4 necessarily disables state attorneys general from suing on their behalf under Title III.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF PENNSYLVANIA, AND VIRGINIA, *AMICI CURIAE*, IN SUPPORT OF THE PETITION

This brief *amici curiae* is submitted by Forty-One States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

Does the phrase "injured in his business or property," as used in section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), require that a consumer suffer a business injury to have standing to sue for damages?

INTEREST OF *AMICI CURIAE*

The *amici* States are interested in this proceeding by virtue of the States' duty to protect the general welfare of their citizens and their role in encouraging and fostering the national economic policy of free competition embodied in the federal and state antitrust laws.

The holding of the Eighth Circuit Court of Appeals, denying standing under section 4 of the Clayton Act to consumers suing for nonbusiness injuries, affects the *amici* States in a number of significant ways. The decision directly challenges the *amici* States' ability to bring federal treble-damage class actions on behalf of nonbusiness consumers. In the past, a number of States have maintained such actions. *See, e.g., In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D. N.Y. 1971).

The decision may also challenge the ability of *amici* States and their political subdivisions to bring federal treble-damage actions on their own behalf because they might not be considered to be injured in their "business or property" in a "commercial" sense.

Moreover, the decision emasculates the *parens patriae* authority given the *amici* States by title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976). The Act, although not creating any new substantive

liability,[1] gave the States standing to bring *parens patriae* actions on behalf of their natural citizens who suffer injuries to their property. According to the Eighth Circuit, however, nonbusiness consumers do not have standing to sue. Thus, because *amici* States only have standing in those cases where a right of action previously existed under section 4, the *parens* authority granted by Congress to the *amici* States is jeopardized.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT PRESENTS A VITALLY IMPORTANT QUESTION REGARDING NONBUSINESS-CONSUMER STANDING UNDER SECTION 4 OF THE CLAYTON ACT.

This case raises a narrow but very important issue: Does a consumer who suffers a nonbusiness injury to his property as the result of an antitrust violation suffer an injury to his "business or property" and thus have standing to maintain an action under section 4 of the Clayton Act?

The Eighth Circuit Court of Appeals, using a strained and restrictive construction of section 4, held that the phrase "injured in his business *or property*" requires a business injury (emphasis added). In essence, the court eliminated the words "or property" from the statute.

If the decision of the Eighth Circuit Court of Appeals is allowed to stand, nonbusiness consumers will no longer have standing to sue for antitrust violations under section 4 of the Clayton Act. The impact of this decision is far-reaching. The

[1] This Court has indicated that title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 did not create any new substantive liability under the antitrust laws. Illinois Brick Co. v. Illinois, 431 U.S. 720, 733-34 n.14 (1977).

effectiveness of private treble-damage actions as a means of enforcing the national antitrust policy will be seriously weakened, and a potent weapon will be removed from the antitrust enforcement arsenal. Moreover, a widespread, judicially-created exemption from antitrust damage actions will exist. All businesses which sell directly to nonbusiness consumers will be immune from damage actions brought by their customers. Therefore, contrary to public policy, these antitrust violators will be permitted to retain their ill-gotten gains while their victims, the purchasing consumers, will lack standing to recover damages.

The Eighth Circuit's decision draws a purely arbitrary distinction which is contrary to the plain meaning of the statute. Nonbusiness purchasers of a product cannot sue for damages caused by antitrust violations while business purchasers of the same product can sue for damages. The recovery of damages, therefore, will no longer depend on the establishment of an antitrust violation and proof of injury, but rather on the status of the injured party. Denying standing to nonbusiness consumers will have the effect of "met[ing] out the sanctions imposed by the antitrust laws unequally." *Lohse v. Dairy Commission*, 1977-2 Trade Cases ¶ 61,805, at 73,337 (D. Nev. 1977).

The ruling by the Eighth Circuit, if allowed to stand, will seriously threaten the effectiveness of the private antitrust action, "one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). If the decision of the Eighth Circuit is not reversed, the admonition of this Court that "[c]ourt[s] should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws,"

Radovich v. National Football League, 352 U.S. 445, 454 (1957), will be ignored. In addition, this Court's desire to keep "already protracted treble-damage proceedings" as simple as possible, *see, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977), will in many cases be frustrated by the elaborate inquiry which may be required to determine whether a product is purchased for a business or nonbusiness purpose.

II. THE DECISION OF THE EIGHTH CIRCUIT IS ERRONEOUS BECAUSE OF THE COURT'S MISINTERPRETATION OF PRIOR JUDICIAL DECISIONS CONSTRUING SECTION 4, AND ITS MISINTERPRETATION OF THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4.

A. Judicial Decisions

While this Court has never specifically ruled on the current issue,[2] the rationale of prior decisions of the Court strongly suggest that the Eighth Circuit's decision was in error. In *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), Justice Holmes indicated that one need not be injured in his business to recover treble damages because a diminution in property was sufficient. *See id.* at 396. The

[2] Seven United States district courts have specifically decided the current issue, five holding that section 4 grants nonbusiness consumers standing to sue. See notes 14-15 *infra* and accompanying text. The district courts holding that nonbusiness consumers do have standing were impressed by, and have relied upon, Judge Larson's well-reasoned district court decision in *Reiter*. *See, e.g., In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639, at 72,630 (C.D. Cal. 1977) ("for the reasons so ably stated by Judge Larson"); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434, at 71,611 (D.D.C. 1977) ("the Court finds the recent opinion of Judge Larson . . . to be particularly persuasive authority").

Eighth Circuit attempts to circumvent this decision by noting that Atlanta "arguably sought recovery for a business injury."[3] However, the basis of this Court's decision was an injury to Atlanta's "property" and not its "business." This Court's recent decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), also demonstrated that nonbusiness consumers may recover damages under the federal antitrust laws.

The rationale this Court used last term in holding that section 4 grants standing to foreign plaintiffs strongly suggests that section 4 should be interpreted to grant standing to nonbusiness consumers. In *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978), this Court stated that:

> [This] Court has noted that § 4 has two purposes: to deter violators and deprive them of " 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries" (citations omitted). To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

If the word "nonbusiness" is substituted for the word "foreign" in this quote, it becomes an excellent analysis of the policy problems which would occur if nonbusiness consumers were denied standing under section 4. To deny a nonbusiness consumer injured by an antitrust violation the right to sue would defeat the purposes of section 4 and would permit the violator to escape full liability for his illegal actions.

[3] Reiter v. Sonotone Corp., 1978-1 Trade Cases ¶ 62,098, at 74,818 (8th Cir. 1978).

The Eighth Circuit also relies heavily on this Court's opinion in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), to support its holding. The specific phrase emphasized by the court is that the words business or property "refer to commercial interests or enterprises." *Id.* at 264. However, as part of the same discussion in *Hawaii*, this Court stated that recovery was disallowed to prevent duplicative recoveries because "consumers . . . may recover themselves under § 4," *id.*, and that "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations . . . ." *Id.* at 266. Thus, when considered in the context of the full discussion, it is readily apparent that the phrase quoted by the Eighth Circuit was not intended to indicate that consumers suffering injury to their property do not have standing to sue under section 4. In fact, taken as a whole, the discussion in *Hawaii* supports the existence of consumer standing.

The Eighth Circuit decision is also in conflict with a long line of circuit and district court cases recognizing nonbusiness-consumer standing.[4] Indeed, from enactment of the Sherman Act in 1890 until 1977,[5] no federal court denied nonbusiness consumers the right to sue for damages under the federal antitrust laws.

[4] *See, e.g.*, Cleary v. Chalk, 488 F.2d 1315, n.17 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *appeal docketed*, No. 78-7389 (2d Cir. July 27, (1978); Lohse v. Dairy Comm'n, 1977-2 Trade Cases ¶ 61,805 (D. Nev. 1977); *In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434 (D.D.C. 1977); Lefrak v. Arabian Am. Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975); Cusick v. N.V. Netherlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022 (E.D. Pa. 1970).

[5] *See* cases cited note 15 *infra* and accompanying text.

B. Statutory Language

Section 4 of the Clayton Act provides a damage remedy for "[a]ny person who shall be injured in his business or property" by a violation of the antitrust laws. The Eighth Circuit construes this language to require an injury of a "commercial nature" and, thus, to deny standing to consumers suffering nonbusiness injuries. *Reiter v. Sonotone Corp.*, 1978-1 Trade Cases ¶ 62,098 (8th Cir. 1978).

This construction is clearly at odds with the plain language of the statute. The statute grants standing to "[*a*]*ny* person who [is] injured in his business *or property*" (emphasis added). Nonbusiness consumers are clearly "persons" and the statutory language does *not* limit recovery to business injuries. Limiting recovery to business injuries changes the plain meaning of the statute. No longer will "[a] person whose property is diminished by a payment of money wrongfully induced [be] injured in his property" within the meaning of the federal antitrust laws. *See Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

The statute is written in the disjunctive, allowing recovery for "business" *or* "property" damages. The use of the conjunction "or" expresses the clear intention of Congress to allow recovery for nonbusiness injuries to property.[6] Limiting recovery to business injuries violates a principal maxim of statutory construction—that Congress intends each word in a statute to have independent meaning and that, if it can be prevented, no clause or word should be considered superfluous. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

[6] *See, e.g.*, Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'").

C. Legislative History

The Eighth Circuit relies on the legislative history of section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), the predecessor of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), to support its restrictive interpretation of the phrase "business or property." The court relies heavily on the fact that the Senate Judiciary Committee, by replacing Senator Sherman's original language "any person or corporation injured or damnified" with "any person . . . injured in his business or property," meant to preclude suits for nonbusiness injuries.[7] The Eighth Circuit concludes, however, that the legislative history of the Sherman Act provides an "inconclusive explanation" for the change.[8] In fact, there is no indication whatsoever in the legislative history suggesting that the change was intended to restrict the class of persons entitled to sue for damages. Thus, the court is forced to rely on the existence of the change itself as proof of Congressional intent to deny recovery for nonbusiness injuries.[9] The court fails, however, to explain why the Senate Judiciary Committee did not use language specifically limiting recovery to business injuries if that was its intent.

The Eighth Circuit also bases its decision on the legislative history of the Clayton Act which adopted the "any person . . . injured in his business or property" language of section 7 of the Sherman Act as part of section 4 of the Clayton Act. The

[7] Reiter v. Sonotone Corp., 1978-1 Trade Cases ¶ 62,098, at 74,815-16 (8th Cir. 1978).
[8] *Id.* at 74,815.
[9] *See id.*

court relies on the legislative history of the Clayton Act to show that the primary purpose of the Act was to protect small businesses and attempts to infer from this that persons suffering nonbusiness injuries were not meant to have standing.[10] However, the court does not cite any legislative history indicating that the protection of small businesses was the sole intent of Congress. In addition, the court apparently fails to recognize that many antitrust violators sell to both business and nonbusiness purchasers and that giving standing to those who suffer nonbusiness injuries may, in many cases, contribute to the protection of small businesses. *Cf. Pfizer Inc. v. Government of India,* 434 U.S. 308, 314 (1978) (interpreting section 4 to grant standing to foreign governments).

Contrary to the Eighth Circuit's analysis, the legislative history of the Sherman and Clayton Acts indicates that Congress intended to give consumers standing to sue for injuries to their property, including nonbusiness injuries. As recently noted by this Court, the legislative history of the Sherman Act "indicate[s] that it was conceived primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), and "Congress has given private citizens rights of action for . . . damages for antitrust violations." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). As succinctly stated by Judge Nickerson, "it would seem anomalous to read the Clayton Act to exclude an action by the very persons sought to be protected." *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D.N.Y. 1978), *appeal docketed,* No. 78-7389 (2d Cir. July 27, 1978).

[10] *See id.* at 74,816.

III. THE DECISION OF THE EIGHTH CIRCUIT MISINTERPRETS, AND WOULD EMASCULATE, THE *PARENS PATRIAE* PROVISIONS OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976.

The decision of the Eighth Circuit is also apparently based, in part, on the belief that the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976), "will effectively protect the interests of consumers." *Reiter v. Sonotone Corp.*, 1978-1 Trade Cases ¶ 62,098, at 74,281 (8th Cir. 1978). However, because the *parens patriae* provisions of the Act are only procedural in nature, the effectiveness of the Act depends on the prior existence of consumer standing. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 733-34 n.14 (1977).

The *parens patriae* provisions of the Act were passed to establish a more effective procedure for asserting the rights and remedies of natural persons[11] by granting State Attorneys General standing to bring actions on behalf of natural citizens suffering injury to their property. The *parens patriae* provisions were not intended to create any new substantive liability.[12] *See* H.R. Rep. No. 499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2578. No

[11] The class of persons protected by the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 are "natural persons," excluding "proprietorships or partnerships," 15 U.S.C. § 15g(3) (1976), in other words, nonbusiness consumers, the class denied standing by the Eighth Circuit.

[12] For an analysis of the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 which concludes that no new substantive remedy was intended to be added by title III, see Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976,* 77 Colum. L. Rev. 679, 722-25 (1977).

new substantive liability was thought to be necessary because, as Congress recognized, "any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, *has a cause of action*." H.R. Rep. No. 499, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2575 (emphasis added). Thus, contrary to the import of the Eighth Circuit's analysis, the 94th Congress intended to provide a more effective procedural remedy for natural citizens than *already existed* under section 4 of the Clayton Act.[13]

The anomaly of the Circuit Court's decision is obvious—nonbusiness consumers do not need standing to sue under section 4 because they are protected by the States' *parens patriae* authority; however, for the States to have *parens patriae* authority, standing for nonbusiness consumers must exist under section 4. Thus, the Eighth Circuit's decision would virtually nullify the *parens patriae* authority which Congress explicity granted to the States.

[13] Of course, the belief of the 94th Congress regarding the intent of the Congress that passed section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (superseded by section 4 of the Clayton Act), is not controlling. However, the interpretation of a later Congress regarding what an earlier Congress meant is surely entitled to some weight, especially when, as here, it agrees with the majority of courts that have considered the question. See notes 14-15 *infra* and accompanying text.

IV. THE QUESTION OF NONBUSINESS-CONSUMER STANDING UNDER SECTION 4 HAS RESULTED IN A SPLIT OF AUTHORITY AMONG THE DISTRICT COURTS AND WILL LIKELY LEAD TO A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS.

In the last two years, at least seven United States district courts have specifically decided the narrow issue presented by this case. Five of these courts,[14] located in four different circuits, interpreted section 4 of the Clayton Act to grant nonbusiness purchasers standing to sue while two[15] reached the opposite conclusion. The decisions of both courts denying standing and the decision of one of the courts granting standing have been appealed and are currently pending before three

[14] Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *appeal docketed*, No. 78-7389 (2d Cir. July 27, 1978); Lohse v. Dairy Comm'n, 1977-2 Trade Cases ¶ 61,805 (D. Nev. 1977); *In re* Petroleum Prods. Antitrust Litigation, 1977-2 Trade Cases ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, 1977-1 Trade Cases ¶ 61,434 (D.D.C. 1977); Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977), *rev'd*, 1978-1 Trade Cases ¶ 62,098 (8th Cir. 1978).

[15] While four United States district court decisions have held that nonbusiness consumers do not have standing, three of them were decided on the same day by the same judge. All four of the decisions have been appealed. *See* Ware v. Trailer Mart, Inc., No. C74-394 (N.D. Ohio, decided May 31, 1978), *appeal docketed*, No. 78-3383 (6th Cir. July 20, 1978); Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 and related cases (9th Cir. Mar. 3, 1977); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), *appeal docketed*, No. 77-1896 (9th Cir. Apr. 22, 1977); Smith v. Toyota Motor Sales, U.S.A., Inc., 1977-1 Trade Cases ¶ 61,251 (N.D. Cal. 1977), *appeal docketed*, No. 77-1849 and related cases (9th Cir. Apr. 15, 1977).

different circuit courts: the Second Circuit, the Sixth Circuit, and the Ninth Circuit.[16]

While no other circuit court has explicitly ruled on the issue, and thus a direct split of authority between the circuits does not currently exist, a split is virtually certain to occur in the near future because the Eighth Circuit's decision is inconsistent with the decisions of other circuit and district courts[17] and the issue is already pending before three other circuits.

While granting the writ of certiorari will require that this Court spend its valuable judicial time considering the issue, it is respectfully submitted that this Court ultimately will be faced with this question, and that a definitive ruling at this time will conserve considerable judicial time in the lower courts. Moreover, a reversal of the Eighth Circuit decision by this Court will alleviate the disenfranchisement of nonbusiness consumers in the States of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, and will remove any chilling effect this precedent may have on the exercise of valid consumer rights in other circuits.

CONCLUSION

Because of the importance of this question, the fact that the Eighth Circuit erroneously decided the issue, the emasculation of the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the inconsistency between the Eighth Circuit decision and decisions of other

[16] See notes 14-15 *supra*.
[17] *See* cases cited note 4 *supra* and accompanying text.

lower courts and this Court, the petititon for a writ of certiorari to the Eighth Circuit Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Petitioner,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1978
CERTIORARI GRANTED JANUARY 8, 1979

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Petitioner,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Respondents.

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RELEVANT DOCKET ENTRIES

5-5-75—1—Filed COMPLAINT
Issued summons and 5 copies
Case assigned to Judge Larson, case card No. 449

5-28-75—6—Filed SUMMONS with Marshal's return of service on 5-6-75, 5-7-75, 5-13-75 & 5-15-75.

6-26-75—9—Filed deft. DAHLBERG ELECTRONICS, INC.'S ANSWER with affidavit of serv. by mail on 6-26-75.

6-27-75—10—Filed separate ANSWER OF DEFT. RADIOEAR CORPORATION to complaint with aff. of serv. by mail on 6-26-75.

1-26-76—18—ANSWER OF SONOTONE CORPORATION.

3-15-76—19—MEMORANDUM ORDER (Larson, J) that defendant's motions to quash and for dismissal on the grounds of absence of personal jurisdiction and improper venue be denied.

5-11-76—25—ANSWER OF BELTONE ELECTRONICS CORPORATION.

10-26-76—27—ANSWER OF TEXTRON INC.

12-29-76—30—NOTICE AND MOTION OF TEXTRON INC., RADIOEAR CORP., BELTONE ELECTRONICS CORP. AND DAHLBERG ELECTRONICS, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT, ret. 2-1-77 at 9:00 a.m.

2-1-77—33—MINUTES OF PROCEEDINGS (Larson, J) (Stafford, R) motion of Beltone, Dahlberg, Textron & Radioear for judgment on the pleadings or for summary judgment, argued, submitted & taken under advisement.

2-4-77—34—REPORTER'S TRANSCRIPT OF PROCEEDINGS (Larson, J) (Stafford, R) for 2-1-77. (Separate).

3-31-77—36—MEMORANDUM ORDER (Larson, J) that defendants' motions for dismissal or, in the alternative, for summary judgment be, and hereby are, denied.

5-2-77—38—NOTICE OF MOTION AND MOTION of Textron, Inc, Radioear Corporation, Beltone Electronics Corporation, and Dahlberg Electronics, Inc. for an order for entry of an amendment to its Order of March 31, 1977, so as to certify said Order for an immediate appeal to the Court of Appeals for the Eighth Circuit, ret. 5-10-77 at 8:45 a.m.

5-10-77—39—MINUTES OF PROCEEDINGS (Larson, J) (Stafford, R) motion of all defts. (except Sonotone) for certification of 3-31-77 Order for appeal to 8th Circuit, argued, submitted & taken under advisement.

5-10-77—40—AMENDED ORDER (Larson, J) that all further proceedings in this matter, including discovery, shall be stayed, pending the disposition by the Court of Appeals of defendants' appeal from this Order.

5-31-77—42—REPORTER'S TRANSCRIPT OF PROCEEDINGS (Larson, J) (Stafford, R) for 5-10-77 (Separate).

6-20-77—44—CERTIFIED COPY OF ORDER FROM THE EIGHTH CIRCUIT COURT OF APPEAL that application for leave to take interlocutory appeal has been considered by the court and is granted.

10-4-78—49—CERTIFIED COPY OF OPINION FROM THE EIGHTH CIRCUIT COURT OF APPEALS.

RULINGS OF THE LOWER COURTS

The opinion of the United States District Court for the District of Minnesota is reported at 435 F.Supp. 933 and is reprinted in the Petition for Writ of Certiorari at page A-2. The District Court's Amended Order is reprinted in the Petition at page A-1.

The opinion and the Order denying Petition for Rehearing en banc of the United States Court of Appeals for the Eighth Circuit are reported at 579 F.2d 1077 and are reprinted in the Petition at pages A-12 and A-31, respectively.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation and RADIOEAR CORPORATION, a Delaware corporation,

Defendants.

COMPLAINT
ANTITRUST CONSUMER CLASS ACTION
Civil No. CIV. 4-75-206

The plaintiff, by her attorneys, for her complaint against defendants, demanding a trial by jury respectfully alleges:

DEFINITION

1. As used herein, "hearing aid" means all products ordinarily manufactured and/or sold by hearing aid manufacturers, including defendants herein, for personal use.

JURISDICTION AND VENUE

2. This Complaint is filed and jurisdiction of this Court is invoked pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) to recover treble damages sustained by plaintiff and other members

of the class represented by her, and injunctive relief if appropriate by reason of the violations by defendants of Section 1 of the Sherman Act (15 U.S.C. 1).

3. Each of the defendants either transacts business or is found within the District of Minnesota, or the effects of the illegal activities alleged herein were felt in said district.

PLAINTIFF AND CLASS

4. Plaintiff is an individual residing in Richfield, Minnesota, who purchased two hearing aids during the year 1973.

5. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on her behalf and as representative of a class. The class consists of all persons in the United States or any sub part thereof who directly or indirectly purchased, at prices affected by the activities complained of, hearing aids.

6. Said class members are in a similar position to that alleged herein by plaintiff, and are members of a class so numerous that joinder of all parties is impracticable.

7. The rights of said class members, including plaintiff, involve common questions of law and fact which predominate over any questions affecting only individual class members, and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

8. The claims of plaintiff are typical of those to be asserted for the class, and plaintiff will fairly and adequately protect the interests of the class.

DEFENDANTS

9. BELTONE ELECTRONICS CORPORATION (hereinafter "Beltone") is named a defendant herein. Beltone is a corporation organized under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Beltone has manufactured hearing aids since 1941. In 1970, Beltone had sales of hearing aid products in excess of ten million ($10,000,000.00) Dollars, more than any other seller of hearing aids in the United States, representing approximately twenty per cent (20%) of the hearing aid market.

10. DAHLBERG ELECTRONICS, INC. (hereinafter "Dahlberg") is named a defendant herein. Dahlberg is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. Dahlberg and its corporate predecessors have manufactured hearing aids since 1949. In 1970, Dahlberg was the third largest hearing aid manufacturer with sales in excess of four million ($4,000,000.00) dollars, representing approximately eight per cent (8%) of the hearing aid market.

11. SONOTONE CORPORATION (hereinafter "Sonotone") is named a defendant herein. Sonotone is a corporation organized under the laws of the State of New York, with its principal place of business in Elmsford, New York. Sonotone has manufactured hearing aids since 1929. In 1970, Sonotone was the fifth largest hearing aid manufacturer in the United States, with sales in excess of three million $3,000,000.00) dollars, representing approximately six per cent (6%) of the hearing aid market.

12. TEXTRON, INC. (hereinafter "Textron") is named a defendant herein. Textron is a corporation organized under the laws of the State of Delaware, with its principal place of business in Providence, Rhode Island. Maico Hearing Instruments (hereinafter "Maico") is, and has been since 1966, an unincorporated division of Textron, with its principal place of business in Minneapolis, Minnesota. Maico was the fourth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars representing more than six per cent of the hearing aid market.

13. RADIOEAR CORPORATION (hereinafter "Radioear") is named a defendant herein. Radioear is a corporation incorporated under the laws of the State of Delaware, with its principal place of business at Coanosburg, Pennsylvania. Radioear has manufactured hearing aids since 1924. In 1970, Radioear was the seventh largest hearing aid mnaufacturer in the United States with the sales in excess of two million ($2,000,000.00) dollars, representing approximately four per cent (4%) of the hearing aid market.

CO-CONSPIRATORS

14. Various corporations, firms and individuals not made defendants in this complaint participated as co-conspirators in the violations alleged herein, and performed acts and made statements in furtherance thereof.

NATURE OF TRADE AND COMMERCE

15. Defendants are now and for some time have engaged in the business of manufacturing, distributing, selling and repairing hearing aids in various states of the United States and in foreign countries. Defendants distribute and sell hearing aid products to selected retail dealers located throughout the United States, who then resell to the general public. Wholesalers are rarely used in the distribution process.

16. In the course and conduct of their businesses, defendants ship or cause to be shipped, from their respective facilities located in their principal place of businesses aforementioned, in a continuous and uninterrupted flow of interstate commerce, hearing aids to selected retail dealers throughout the United States.

17. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to fifty million ($50,000,000.00) dollars at the

manufacturers' prices, and an estimated $175 million at retail prices.

In 1970, approximately fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

18. The success of the established hearing aid manufacturers, including defendants, in selling their products is based primarily on their ability to secure the services of retail dealers to sell their products to the hearing handicapped. Similarly, new entrants in the market to be successful must secure distribution through established dealers.

19. Approximately sixty per cent (60%) of the retail sales of hearing aids occur as a result of initial, direct contact between the hearing aid dealer and the hearing handicapped while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from the use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Inasmuch as the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is approximately $100.00 the average retail price is approximately $350.00. Over fifty per cent (50%) of the persons with hearing impairment who purchase hearing aids are over sixty five years of age.

OFFENSES CHARGED

20. Beginning at a time unknown to plaintiff, and continuing up to and including the date of the filing of this Complaint, the defendants and other persons acting for each of them, have been and are now engaged in:

A. A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in hearing aids in violation of Section 1 of the Sherman Act;

B. A continuing combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in hearing aids in violation of Section 2 of the Sherman Act.; and

C. Leases, sales and contracts relating to the interstate commerce of the United States in hearing aids in violation of Section 3 of the Clayton Act.

21. Each act of defendants and co-conspirators herein alleged was done in furtherance of the offenses charged in the preceding paragraph, was a part thereof and was done with the primary purpose and intent of restraining, monopolizing, attempting to monopolize and substantially lessening competition in the trade and commerce described herein. It was the intent, jointly and severally, of defendants and co-conspirators, *inter alia*, to:

A. Eliminate competition in hearing aids in the United States;

B. Use their monopoly power in hearing aids to eliminate competition;

C. Combine their economic power to eliminate competition in hearing aids; and

D. Obtain substantial and unconscionable profits for themselves, at the expense of plaintiffs, as a direct result of the restrictions upon competition in the trade and commerce herein alleged.

ACTS OF DEFENDANTS AND CO-CONSPIRATORS

22. In the course and conduct of its business of manufacturing, distributing, selling and repairing hearing aids, defendants have been and are presently pursuing the following courses of action:

A. Requiring their respective selected dealers to sell their respective hearing aids within assigned geographic areas;

B. Requiring their respective selected dealers to deal exclusively in their respective hearing aids;

C. Fixing, establishing, controlling and maintaining the retail prices at which their dealers sell their respective hearing aids;

D. Prohibiting their dealers from dealing with certain potential customers;

E. Prohibiting non-dealers from dealing in, or repairing their respective hearing aids.

F. Appropriating and using for their purposes the names and addresses of their dealer's customers.

23. In furtherance of these courses of action, defendants have been and are now engaged, *inter alia*, in the following acts and practices:

A. Distributing and selling their hearing aids directly to selected retail dealers, and refusing to deal with all other dealers;

B. Refusing to issue the express product warranties to consumers unless and until their dealers have reported the names and addresses of their customers to them;

C. Encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

D. Engaging in extensive national brand advertising of their hearing aids;

E. Causing their dealers' retail prices for hearing aids to be set at more than 300% above the manufacturers' prices as to the dealers;

F. Selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers;

G. Entering into agreements or understandings with their respective dealers, which agreements, *inter alia*, either expressly or by implication:

1. Establish restrictive territories within which the dealers may advertise and sell their products;

2. Require exclusive dealing in defendants' products;

3. Assign sale or purchase quotas to be met by their dealers;

4. Encourage or require the use of the manufacturers' brand name in the dealers' trade styles;

5. Restrict the classes of customers with whom their dealers may deal;

6. Require their dealers to submit the names and addresses of their customers to the defendants;

7. Permit the defendants to terminate such agreements without cause upon thirty days notice; and

8. In the event of such termination, permit the defendants to repurchase the terminated dealers' products purchased from such defendants.

H. Expressing, communicating or emphasizing to their selected dealers their business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, *inter alia*, persuasion, pressure, harassment, coer-

cion, or intimidation of such dealers to sell only defendants' products, and not to sell other brands.

24. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

EFFECTS OF OFFENSES

25. The acts and practices of defendants enumerated in paragraphs 22 and 23, taken either individually or collectively, are oppressive, coercive, unfair and anti-competitive, and have the tendency and capacity of hindering, suppressing or eliminating competition. The intended and actual effects of the offenses heretofore alleged were and are that defendants and co-conspirators:

A. Hindered and suppressed competition between defendants and other hearing aid manufacturers;

B. Eliminated competition among and between dealers dealing in defendants' hearing aids;

C. Deprived such dealers of their freedom to select their customers and otherwise to function as free and independent dealers;

D. Deprived such dealers of their ownership of, and freedom to maintain, confidential lists of their customers;

E. Hindered and suppressed competition among dealers dealing in defendants' hearing aids;

F. Deprived retail dealers of hearing aids of their freedom to act in the best interests of the hearing handicapped and their own business interests and pursuits;

G. Deprived consumers of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviations of their hearing impairment;

H. Deprived consumers of the benefits of free competition.

I. Deprived those engaged in the repairing or servicing of hearing aids in competition with defendants of their right to repair or service defendants' hearing aids;

J. Raised, fixed, stabilized and maintained at noncompetitive levels prices of hearing aids and equipment sold by defendant corporations and co-conspirators to plaintiff and members of the class;

K. Restricted and suppressed competition between and among defendants and co-conspirators, and deprived purchasers of aids and equipment, including plaintiff and members of the class, of the benefits of free and open competition.

L. Proximately damaged plaintiff and members of the class in their properties through having to pay a higher price for hearing aids and services than what they would otherwise have had to pay in a free competitive market place.

M. Plaintiff and members of the class have been and are presently being damaged by the effects of the defendants' offenses.

FRAUDULENT CONCEALMENT

26. At all times relevant hereto Plaintiff had no knowledge of the combination and conspiracy herein alleged or of any action that might have led to the discovery thereof until the filing of actions by the Federal Trade Commission on May 8, 1973. Plaintiff and the other members of the class she represents could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy and activities were concealed by the defendants through their adoption of elaborate schemes including the resort to secrecy to avoid detection.

PRAYER

WHEREFORE, Plaintiff prays that this Court Order adjudge and decree:

A. That Plaintiff and the class she represents have judgment against the defendants for three fold the amount of damages determined that have been sustained as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15);

B. That Plaintiff and the class she represents recover their costs of suit including reasonable attorneys' fees as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15); and

C. That Plaintiff and the class she represents have such other and further relief, including injunctive, as the Court deems proper.

Dated: May 2nd, 1975.

COCHRANE & BRESNAHAN
By JOHN A. COCHRANE
JOHN E. THOMAS
Attorneys for Plaintiffs
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DEFENDANT TEXTRON INC.

(Title omitted in printing)

Now comes the above named defendant, Textron Inc., by and through its attorneys, Robins, Davis & Lyons, and in answer to plaintiff's complaint says as follows:

1. States that paragraph 1 requires no answer.

2. Admits that the complaint purports to have been filed pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) but denies the remaining allegations of paragraph 2.

3. Admits that the Maico Hearing Instrument Division of Textron Inc. transacts business and is found within the District of Minnesota, but denies the remaining allegations in paragraph 3.

4. Denies the allegations of paragraphs 4, 5, 6, 7 and 8.

5. Alleges that it is without knowledge or information sufficient to form a belief as to the allegations of paragraphs 9, 10 and 11.

6. Alleges that it does not have sufficient information or knowledge to admit or to deny the figure set forth in paragraph 12 with respect to market share or rank. Admits the remaining allegations of paragraph 12.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the allegations in paragraph 13.

8. Denies the allegations in paragraph 14.

9. With reference to the allegations set forth in paragraph 15, alleges that it is without sufficient information or knowledge to admit or to deny the allegations as to any defendant other than Textron. Textron avers that it has used and is using wholesalers in the distribution of hearing aids and admits the remaining allegations of paragraph 15.

10. Alleges that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 16 as to any defendants other than Textron. Textron admits the allegations in paragraph 16 except denies that its sales or

shipments are in a continuous and uninterrupted flow of interstate commerce.

11. Alleges that it is without sufficient information or knowledge to admit or to deny with respect to the term "substantial" as it is used in paragraph 17 and that it is without sufficient information to admit or to deny the reliability and accuracy of the figures set forth therein.

12. With reference to the allegations set forth in paragraph 18, admits that Textron, through the Maico Hearing Instrument Division, sells its product primarily to retail dealers who in turn sell to the public but denies the remaining allegations in paragraph 18 except to allege that it is without sufficient information or knowledge to admit or to deny the allegations set forth with respect to other manufacturers.

13. Alleges that it is without sufficient information or knowledge to admit or to deny the broad allegations of paragraph 19 as to the practices of manufacturers and dealers other than Textron, or as to the practices of medical doctors in hearing clinics. Textron further does not have sufficient information or knowledge to admit or to deny that over 50 percent of the persons with hearing impairment who purchase hearing aids are over 65 years of age. Textron denies all of the remaining allegations in paragraph 19.

14. Denies all the allegations in paragraph 20 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 20 as to the practices of other defendants.

15. Denies all the allegations in paragraph 21 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 21 as they relate to the intent of other defendants and co-conspirators.

16. Denies all the allegations in paragraph 22 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations in paragraph 22 as they relate to the courses of action of other defendants.

17. States that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 23 as they relate to the acts and practices of other defendants. As to the practices of Textron, Textron alleges as follows:

a. In reference to the allegations of paragraph 23A, Textron states that it does sell its hearing aids to selected retail dealers, factory-owned branch offices and distributors, and has chosen not to sell its products to all persons who have requested said products.

b. Admits the allegations set forth in paragraph 23B but alleges that it does honor claims within the warranty period even though the express product warranty has not been delivered to the ultimate customer.

c. Denies the allegations in paragraph 23C.

d. With reference to the allegations of paragraph 23D, Textron does not have sufficient information or knowledge to admit or deny with respect to the term "extensive" as used in this paragraph, but states that it does engage in limited national brand advertising of its hearing aids.

e. Denies the allegations of paragraph 23E.

f. Admits the allegations in paragraph 23F and states that this practice insures that the consumers of Textron hearing aid products will receive high quality repair service.

g. (1) Denies the allegations in paragraph 23G1.

(2) Denies the allegations in paragraph 23G2 and alleges that its dealers sell competitive hearing aids.

(3) Denies the allegations in paragraph 23G3 but states that it does from time to time have an incentive program which incourages dealers to meet certain reasonable sales objectives.

(4) Denies the allegation in paragraph 23G4 and alleges that its dealers can only use the manufacturer's brand name and the dealer style with Textron's written consent.

(5) Denies the allegations in paragraph 23G5.

(6) Denies the allegations in paragraph 23G6.

(7) Denies the allegations in paragraph 23G7.

(8) Admits the allegation of paragraph 23G8 with respect to the contracts it has with its dealers.

h. Denies the allegations in paragraph 23H.

18. Denies the allegations in paragraphs 24, 25 and 26.

FIRST AFFIRMATIVE DEFENSE

19. Alleges that plaintiff's complaint fails to state a claim against Textron upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. Alleges that neither the plaintiff nor any member of the alleged class has been injured in his business or property within the meaning of Section 14 of the Clayton Act (15 U.S.C. Section 15) by reason of any act of Textron alleged in the complaint.

THIRD AFFIRMATIVE DEFENSE

21. Alleges that plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to any act of Textron alleged in the complaint.

FOURTH AFFIRMATIVE DEFENSE

22. Alleges that plaintiff's action cannot be maintained as a class action for either damages or injunctive relief under Rule 23 of the Federal Rules of Civil Procedure for, inter alia, the following reasons:

a. The named plaintiff is not a proper representative of any "class" within the meaning of Rule 23; and

b. Any questions of law or fact raised by plaintiff are not common to the alleged class; and

c. The claims of the plaintiff are not typical of the claims of the alleged class; and

d. The named plaintiff will not fairly and adequately protect the interests of the alleged class; and

e. The prosecution of separate actions by individual members of the class would not create the risk of inconsistent or varying adjudications or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; and

f. Textron and other defendants have not acted, nor refused to act or will not act on grounds generally applicable to the class; and

g. The questions of law and fact common to the members of the class do not predominate over any questions affecting only individual members and the class action is not superior to other available methods for adjudication; and

h. The class action is entirely unmanageable; and

i. Plaintiff has made no showing of a willingness or ability to bear the costs of maintaining the class action under Rule 23, including the costs of notice.

FIFTH AFFIRMATIVE DEFENSE

23. The claims of plaintiff and members of the alleged class are subject to the four year statute of limitations set forth in Section 4(b) of the Clayton Act (15 U.S.C. Section 15b).

Wherefor, defendant Textron prays that this Court dismiss the pretended complaint against it, both as to plaintiff and the members of the alleged class, that plaintiff take nothing by this action, and that Textron have and recover its costs and disbursements herein, including a reasonable attorneys' fee, and that Textron obtain such other and further relief as the Court may deem just and proper.

Dated: June 27, 1975.

ROBINS, DAVIS & LYONS
By Elliot S. Kaplan
By James R. Safley
Attorneys for Textron Inc.
33 South Fifth Street
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

SEPARATE ANSWER OF DEFENDANT RADIOEAR CORPORATION TO COMPLAINT

(Title omitted in printing)

Defendant Radioear Corporation (Radioear), for its Separate Answer to the Complaint herein, alleges and states as follows:

AS A FIRST DEFENSE

1. Except as hereinafter specifically admitted or alleged, denies each and every allegation of the Complaint.

2. Denies that the definition of "hearing aid" set forth in Paragraph 1 is a proper one.

3. Admits that Plaintiff purports to bring this action as alleged in Paragraph 2 but denies the applicability of the statutory authority cited therein and any liability to the Plaintiff. Radioear further alleges that the subject area encompassed by Plaintiff's Complaint has been pre-empted. Thus, any injunctive relief would be inappropriate.

4. Denies the allegations of Paragraph 3 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and therefore denies them.

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 and therefore denies them.

6. Denies the allegations of Paragraphs 5, 6 and 8 and alleges that Plaintiff cannot properly maintain this action on her own behalf or as representative of any class pursuant to Rule 23 of the Federal Rules of Civil Procedure; that the alleged "class members" are not in a similar position to that alleged by Plaintiff; and that Plaintiff's claims are not typical of any class.

7. Denies the allegations of Paragraph 7 and alleges that there is no class whose rights involve common questions of law and fact which predominate over any questions affecting only individuals and that a class action is not superior to other methods for the fair and efficient adjudication of this action. Radioear further alleges, on information and belief, that separate, distinct and unique methods of operation, manufacture, distribution and sale by the various Defendants create or will create questions of law and fact which are not common among the members of any class and will not predominate over any such questions affecting individuals.

8. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 9, 10, 11 and 12 and therefore denies them.

9. Admits the allegations of Paragraph 13 except states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that in 1970 it was "the seventh largest hearing aid manufacturer in the United States with sales in excess of $2 million, representing approximately four percent (4%) of the hearing aid market" and therefore denies the same. It further states that its principal place of business is in Peter Township, Washington County, Pennsylvania, and the post office address is McMurray, Pennsylvania 15317.

10. Denies the allegations of Paragraph 14 as they may relate to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as they may relate to the other Defendants herein and therefore denies them.

11. Admits the allegations of Paragraph 15 as to it except denies that it distributes and sells hearing aid products to selected retail dealers located throughout the United States and alleges to the contrary that it distributes and sells hearing aid products through its existing distribution system to any qualified retail dealer located throughout the United States who solicits or seeks such products. Radioear further denies that prior to May 1, 1974, it distributed or sold hearing aid products to selected retail dealers located throughout the United States, who then resold to the general public, and alleges to the contrary that it distributed hearing aid products by consignment so that no resale occurred. Radioear states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 with

respect to the other Defendants herein and therefore denies them.

12. Admits the allegations of Paragraph 16 as to it except denies that its hearing aids are shipped to selected retail dealers throughout the United States and alleges to the contrary that it distributes and sells hearing aids to any qualified retail dealer located throughout the United States through its existing distribution system. Radioear states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 with respect to the other Defendants herein and therefore denies them.

13. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 and therefore denies them.

14. Denies the allegations of Paragraph 18 as to it, and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and the alleged "new entrants in the market" and therefore denies them.

15. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 19 and therefore denies them.

16. Denies the allegations of Paragraphs 20 and 21 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein, the alleged "other persons acting for each of them" and the alleged "co-conspirators" and therefore denies them.

17. Denies the allegations of Paragraph 22 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and therefore denies them.

18. Denies the allegations of Paragraph 23.

19. Denies the allegations of Paragraph 24 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and the alleged "co-conspirators" and therefore denies them.

20. Denies the allegations of Paragraph 25 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 as to the Plaintiff, the alleged "members of the class," the other Defendants herein and the alleged "co-conspirators" and therefore denies them.

21. Denies the allegations of Paragraph 26 as to it and specifically denies that it has ever concealed or sought to conceal any of its activities or policies by "elaborate schemes including the resort to secrecy to avoid detection." Radioear asserts each and every statute of limitation applicable to Plaintiff's alleged cause of action or causes of action. Radioear further states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26 as to the Plaintiff, the alleged "other members of the class" and the other Defendants herein and therefore denies them. Alleges further that the words beginning after the word "until" and preceding the word "on" in Lines 4 and 5 of Paragraph 26 are redundant, irrelevant, immaterial and should be stricken.

AS A SECOND DEFENSE

22. Alleges that Plaintiff's Complaint fails to state a claim against it upon which relief can be granted.

AS A THIRD DEFENSE

23. Alleges that service of process on it was insufficient.

AS A FOURTH DEFENSE

24. Alleges that this Court lacks jurisdiction over its person.

AS A FIFTH DEFENSE

25. Alleges that Plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to the matters complained of in her Complaint.

AS A SIXTH DEFENSE

26. Alleges that neither Plaintiff nor her attorneys satisfy the requirements and standards of Rule 23 of the Federal Rules of Civil Procedure for the bringing and maintaining of class actions.

AS A SEVENTH DEFENSE

27. Alleges that this action is not a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

AS AN EIGHTH DEFENSE

28. Alleges that neither the Plaintiff nor any member of the alleged class has sustained any injury to their person or property by reason of any conduct on its part.

AS A NINTH DEFENSE

29. Alleges that Plaintiff's alleged cause of action or causes of action did not accrue within the four years next preceding the commencement of this action and therefore that such cause of action or causes of action are barred by the operation of Title 15, United States Code, Section 15(b). Radioear further alleges that Plaintiff has been guilty of laches in the filing of said cause of action or causes of action and therefore that she is estopped from proceeding herewith.

AS A TENTH DEFENSE

30. Radioear further alleges that any prayer for relief by Plaintiff except that for damages and then only by proof by her of actual monetary damages resulting directly from violation of law by this Defendant is moot.

WHEREFORE, Defendant Radioear Corporation prays that this Court dismiss the Complaint against it, that Plaintiff take nothing by this action, and that it have and recover its costs and disbursements herein, including attorneys' fees allowed by law.

Dated: June 26, 1975.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DISTRICT

ANSWER OF DEFENDANT BELTONE
ELECTRONICS CORPORATION

(Title omitted in printing)

Now comes defendant Beltone Electronics Corporation (hereinafter called "defendant Beltone"), acting by and

through its attorneys, James H. Levy and Julian R. Wilheim, and, by way of answer to plaintiff's complaint in the above-entitled action, alleges, as follows:

FIRST DEFENSE

1. The complaint fails to state a claim or a cause of action against defendant Beltone, upon which relief can be granted by this Court.

SECOND DEFENSE

1. As to the allegations contained in paragraph 1 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant alleges that the definition of "hearing aid" alleged therein is not correct or proper, insofar as its activities are concerned, and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

2. As to the allegations contained in paragraph 2 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has, at any time or in any manner, violated Section 1 of the Sherman Act or any other statute; specifically denies that plaintiff or anyone else ever has sustained, for any reason or in any manner, damages in any amount arising out of or from any activities of such defendant; specifically denies that plaintiff or anyone else is entitled, for any reason or in any manner, to injunctive relief against such defendant; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

3. As to the allegations contained in paragraph 3 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has transacted, at any time material herein, or now transacts business in the District of Minnesota within the meaning of the pertinent provisions of the Clayton Act; specifically denies that it has been found, at any time material herein, or now is found within the District of Minnesota within the meaning of the pertinent provisions of the Clayton Act; specifically denies that it has engaged in any illegal activities within the District of Minnesota or anywhere else; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

4. As to the allegations contained in paragraph 4 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

5. As to the allegations contained in paragraph 5 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 5 of the complaint, defendant Beltone alleges that plaintiff can not properly maintain this action pursuant to Rule 23, Federal Rules of Civil Procedure, on her own behalf or as a representative of any Class.

6. As to the allegations contained in paragraph 6 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant denies them. Further, by way of answer to paragraph 6 of the complaint, defendant Beltone alleges that the purported class members alluded to therein are not in a similar position to that alleged by plaintiff.

7. As to the allegations contained in paragraph 7 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 7 of the complaint, defendant Beltone alleges that there is no such class with rights involving common questions of law and fact predominating over questions affecting only individuals and that a class action is not superior to other methods for the fair and efficient adjudication of this action. Further, by way of answer to paragraph 7 of the complaint, defendant Beltone alleges, on information and belief, that the separate distinctive and singular methods and means of operation, manufacture, distribution, and sale of their products by the defendants named in the complaint create questions of law and questions of fact that are not common to members of the alleged class and that will not predominate over questions affecting individuals.

8. As to the allegations contained in paragraph 8 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they are deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 8 of the complaint, defendant Beltone

alleges that plaintiff's claims are not typical of any class and that the alleged "class members" are not in a position similar to that alleged by plaintiff.

9. As to the allegations contained in paragraph 9 of the complaint, defendant Beltone admits that it is named as a defendant in such complaint; admits that it is a corporation organized under the laws of the State of Illinois with its principal and sole place of business in Chicago, Illinois; admits that, since 1941, it has engaged, first, as Beltone Hearing Aid Co. and, later, as Beltone Electronics Corporation, in the manufacture and sale, at wholesale, of Beltone hearing aids; admits that, in its fiscal year 1970, its sales of Beltone hearing aids to retail hearing aid dealers authorized to sell Beltone products to the consuming public were in the aggregate of some $10,000,000.00; and, except as so admitted, qualified, or denied, states that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

10. As to the allegations contained in paragraph 10 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

11. As to the allegations contained in paragraph 11 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

12. As to the allegations contained in paragraph 12 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

13. As to the allegations contained in paragraph 13 of the complaint, defendant Beltone alleges that it does not have suf-

ficient knowledge or information to form a belief and, accordingly, denies them.

14. As to the allegations contained in paragraph 14 of the complaint, defendant Beltone alleges that they are argumentative, conclusions of law, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has conspired, in any manner or by any means, with any corporations, firms, or individuals with regard to any violations of any kind at any time; specifically denies that it has performed, by any means or in any manner, any acts or made any statements in any such conspiracy at any time; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

15. As to the allegations contained in paragraph 15 of the complaint, defendant Beltone admits that it now is engaged and, for sometime last past, has been engaged in the manufacture and sale, at wholesale, of Beltone hearing aids in the United States; admits that it now is engaged and, for sometime last past, has been engaged in the sale, at wholesale, of Beltone hearing aids in certain foreign countries; admits that it now provides and, for sometime last past, has provided repair service for Beltone hearing aids, both in warranty and without cost and also without warranty and at a wholesale charge, as the case may be, to retail hearing aid dealers authorized to sell, at retail, Beltone hearing aids to the consuming public; admits that it sells its products, at wholesale, to retail hearing aid dealers authorized to sell, at retail, Beltone products to the consuming public; admits that such authorized dealers are located at various and sundry places in the United States; admits that such authorized dealers, who

are, in each instance, independent businessmen, sell such Beltone products, at retail, to the consuming public; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

16. As to the allegations contained in paragraph 16 of the complaint, defendant Beltone admits that, in the course and conduct of its business of manufacturing and selling Beltone products, it ships or causes to be shipped, from its sole plant and place of business in Chicago, Illinois, to retail hearing aid dealers, authorized to sell Beltone products to the consuming public, such Beltone products ordered and purchased by such dealers from such defendant at such sole plant and place of business; admits that such dealers authorized to sell such Beltone products are located in various and sundry places in the United States; admits that it ships and has, for sometime last past, shipped its products in interstate commerce; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

17. As to the allegations contained in paragraph 17 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

18. As to the allegations contained in paragraph 18 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies them, insofar as they purport to pertain to it; admits that it now sells and, for sometime last past, has sold, at wholesale only, Beltone hearing aids to Beltone authorized retail hearing aid

dealers only; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

19. As to the allegations contained in paragraph 19 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

20. As to the allegations contained in paragraph 20 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, or any person acting for it, now is engaged or, at any other time, has been engaged in any combination or conspiracy in violation of Section 1 of the Sherman Act; in any combination or conspiracy in violation of Section 2 of the Sherman Act; or in any leases, sales, or contracts in violation of Section 3 of the Clayton Act; or in any violations of any other statutory provisions whatsoever; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

21. As to the allegations contained in paragraph 21 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative, conclusions of law, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it ever has done any act, by way of commission or omission, in furtherance of any offenses charged in the complaint; specifically denies that it ever has done any act, by way of commission or omission, for the purpose or intent of restrain-

ing, monopolizing, attempting to monopolize, or lessening competition in trade or commerce; specifically denies that it, acting either jointly with anyone else or severally, ever intended or acted to eliminate competition in hearing aids in the United States or anywhere else; specifically denies that it now has or ever had any monopoly power of any kind whatsoever; specifically denies that it, acting either jointly with anyone else or severally, ever intended to use any power it possessed to eliminate competition in hearing aids; specifically denies that it now has or ever had any economic power to eliminate competition in hearing aids; specifically denies that it, acting either jointly with anyone else or severally, ever intended to combine whatever economic power it possessed with that of anyone else to eliminate competition in hearing aids; specifically denies that it obtained substantial or unconscionable profits or any profits whatsoever for itself, at the expense of plaintiffs or anyone else, as a result of any restrictions upon competition in trade or commerce or in any other way whatsoever; specifically denies that it, acting either jointly with anyone else or severally, ever intended to obtain substantial or unconscionable profits for itself, at the expense of plaintiffs or anyone else, as a result of any restrictions upon competition in trade or commerce or in any other way whatsoever; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

22. As to the allegations contained in paragraph 22 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that, in the course

or conduct of its business of manufacturing, distributing, selling, or repairing hearing aids or otherwise, it, acting either jointly with anyone else or severally, has, at any time material herein, used or pursued or now is using or pursuing a course of business behavior parallel to that of any other manufacturer or anyone else; specifically denies that, in the course or conduct of its business of manufacturing, distributing, selling, or repairing hearing aids or otherwise, it, acting either jointly with anyone else or severally, has, at any time material herein, pursued or now is pursuing any course of action alleged in subparagraphs A, B, C, D, E, or F thereunder; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

23. As to the allegations contained in paragraph 23 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone else or severally, has, at any time material herein, engaged or now is engaging in any acts or practices in furtherance of any courses of action alleged in paragraph 22 of the complaint; alleges that it has been, at all times material herein, engaged and now is engaged in the manufacturer of Beltone hearing aids for sale at wholesale only; alleges that it has been, at all times material herein, engaged and now is engaged in the sale of only new Beltone hearing aids; admits that it has, at all times material herein, sold and now is selling such new Beltone hearing aids only to authorized Beltone retail hearing aid dealers; admits that it has, at all times material herein, refused and now is refusing to sell such

new Beltone hearing aids to retail hearing aid dealers who are not authorized Beltone hearing aid dealers; admits that it has, at all times material herein, required and now is requiring that, before its one-year factory guarantee may be issued to a retail purchaser of a new Beltone hearing aid, a guarantee registration card must be sent to it by the authorized Beltone dealer making such retail sale and that such registration card states, among other things, the name and address of such retail purchaser and the Beltone model and serial number of the hearing aid; admits that it has, at all times material herein, encouraged and now is encouraging authorized Beltone retail hearing aid dealers to participate in its advertising programs; admits that it has, at all times material herein, denied cooperative advertising allowances to authorized Beltone retail hearing aid dealers who may wish to advertise competing brands of hearing aids in the same advertisement with new Beltone hearing aids; admits that it has, at all times material herein, engaged and now is engaging in substantial national advertising of new Beltone hearing aids; specifically denies that it has, at any time material herein, caused to be set or has set or now is causing to be set or now is setting the retail prices charged by authorized Beltone hearing aid dealers or anyone else for Beltone hearing aids; admits that it has, at all times material herein, sold and now is selling its factory repair parts for Beltone hearing aids only to authorized Beltone hearing aid dealers; admits that it has, at all times material herein, offered and now is offering its factory repair service for Beltone hearing aids only to authorized Beltone hearing aid dealers; admits that it has, at all times material herein, refused and now is refusing to sell its factory repair parts for Beltone hearing aids to anyone except authorized Beltone hearing aid dealers; admits that it has, at

all times material herein, refused and now is refusing to offer its factory repair service for Beltone hearing aids to anyone except authorized Beltone hearing aid dealers; admits the allegations contained in subparagraph G thereunder, including the several sub-subparagraphs set forth therein, only to the extent that they are borne out by the several authorized dealer agreements between such defendant and the several retail hearing aid dealers authorized to sell Beltone products to the consuming public and also by the pertinent records of such defendant; specifically denies that it, acting either jointly with anyone else or severally, has had, at any time material herein, or now has a policy of any kind to dissuade, discourage, or prohibit, by means of persuasion, pressure, harassment, coercion, or intimidation, sales of competitive brands of hearing aids by authorized Beltone hearing aid dealers; specifically denies that it, acting either jointly with anyone else or severally, has, at any time material herein, expressed, communicated, or emphasized or now is expressing, communicating, or emphasizing to authorized Beltone hearing aid dealers any policy on its part to dissuade, discourage, or prohibit, by means of persuasion, pressure, harassment, coercion, or intimidation, sales of competitive brands of hearing aids by such hearing aid dealers; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

24. As to the allegations contained in paragraph 24 of the complaint, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do no require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it ever has formed or effectuated or now is forming or effectuating

any combination or conspiracy alleged in such complaint or otherwise; specifically denies that it ever has done or now is doing anything whatsoever with anyone else whatsoever in regard or in relation to any such purported combination or conspiracy; and, except as so admitted, qualified, or denied, denies such allegations.

25. As to the allegations contained in the first sentence of paragraph 25 of the complaint, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has, at any time material herein, engaged or now is engaging, in any manner or by any means, in any acts or practices whatsoever that are oppressive, coercive, unfair, or anticompetitive or that have the tendency or capacity of hindering, suppressing, or eliminating competition and, except as so admitted, qualified, or denied, denies such allegations.

26. As to the allegations contained in the second sentence of paragraph 25 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone or severally, ever committed or now is committing any offenses alleged in such complaint; specifically denies that it, acting either jointly with anyone or severally, ever caused or now is causing any intended or actual effects such as it is sought to be alleged in subparagraphs A through M, inclusive, thereunder; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief

and, accordingly, denies such allegations. Further by way of answer to subparagraph L in the second sentence of paragraph 25 of the complaint, defendant Beltone specifically denies that it, acting either jointly with anyone or severally, ever has damaged or now is damaging plaintiff or anyone else to the extent or in the manner or by the means alleged therein or to any other extent or in any other manner or by any other means. Further, by way of answer to subparagraph M in the second sentence of paragraph 25 of the complaint, defendant Beltone specifically denies that it, acting either jointly with anyone or severally, ever committed or now is committing any offenses alleged in such complaint and specifically denies that it, acting either jointly with anyone or severally, ever has damaged or now is damaging plaintiff or anyone else to the extent or in the manner or by the means alleged therein or to any other extent or in any other manner or by any other means.

27. As to the allegations contained in paragraph 26 of the complaint, defendant Beltone alleges that they are vague, ambiguous, argumentative, and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone or severally, ever engaged or now is engaging in any unlawsul conspiracy or activities; specifically denies that it, acting either jointly with anyone else or severally, ever adopted or now is adopting any scheme whatsoever to avoid detection of any such conspiracy or activities; and, except as so admitted, qualified, or denied, denies such allegations.

28. Defendant Beltone denies, generally and specifically, each and every material allegation of fact contained in the complaint not hereinbefore admitted, qualified, or denied.

FIRST AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that neither plaintiff nor any member of the purported class has been injured in his or her business or property within the meaning of Section 14 of the Clayton Act or any other statute by reason or as a result of any act of such defendant alleged in the complaint or otherwise.

SECOND AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that plaintiff is without standing to sue either in her own behalf or as a representative of any purported class with regard to any act of such defendant alleged in the complaint or otherwise.

THIRD AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that plaintiff's action can not be maintained as a class action for either damages or injunctive relief under Rule 23 of the Federal Rules of Civil Procedure for, among other things, the following reasons:

(a) Plaintiff Reiter, the named plaintiff in the complaint, is not a proper representative of any "class" within the meaning of Rule 23, Federal Rules of Civil Procedure;

(b) Any questions of law or fact raised by plaintiff herein are not common to the alleged class;

(c) Plaintiff's claims are not typical of the claims of the alleged class;

(d) Plaintiff will not fairly and adequately protect the interests of the alleged class;

(e) The prosecution of several actions by individual members of the purported class would not create the risk of inconsistent or varying adjudications or the risk of adjudications with regard to individual members of such class, which would, as a practical matter, be dispositive of the interests of other

members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(f) Defendant Beltone and the other defendants named herein have not acted or refused to act and they will not act on grounds generally applicable to the purported class;

(g) The questions of law and fact common to the members of the purported class do not predominate over any questions affecting only individual members thereof and the class action is not, in the attendant circumstances, superior to the other available methods for adjudication;

(h) This purported class action is entirely unmanageable; and

(i) Plaintiff has made no showing of either willingness or ability to bear the costs of maintaining a class action under Rule 23, Federal Rules of Civil Procedure, including, but not limited to, the costs of notice.

FOURTH AFFIRMATIVE DEFENSE

1. The claims of plaintiff and any members of the purported class are barred by application of the four-year statute of limitations set forth in Section 4(b) of the Clayton Act and also they are estopped from proceeding herein by reason of laches in the filing of the complaint and the causes of action alleged in the complaint.

WHEREFORE, defendant Beltone prays that this Court enter an Order and Judgment herein dismissing, with prejudice, the complaint against it, insofar as both plaintiff and members of the purported class are concerned, and ordering that plaintiff take nothing by this action and such defendant have and recover its costs and disbursements herein, including reasonable attorneys' fees, and granting to such defendant

such other and further relief, as to the Court shall seem meet, just, and proper in the premises.

Dated: May 10, 1976.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DAHLBERG ELECTRONICS, INC.

(Title omitted in printing)

Dahlberg Electronics, Inc. (hereinafter referred to as "Dahlberg"), by its undersigned attorneys, answers the plaintiff's numbered allegations of the complaint paragraphs seriatim as follows:

Dahlberg is without information sufficient to form a belief as to the truth of the allegations relating to the other defen-

dants and therefore denies same, except as specifically qualified below.

1. Declaratory, requiring no answer.

2. Jurisdiction is admitted, except that Dahlberg denies that it has violated any of the statutes as alleged.

3. Venue is admitted.

4. Lacking knowledge, denied.

5-8. Dahlberg denies that the alleged class is proper or that this action is maintainable as a class action under FRCP Rule 23.

9, 11-13. Admitted that Beltone Electronics Corporation, Sonotone Corporation, Textron, Inc. and Radioear Corporation are hearing aid manufacturers. Lacking information, the remaining allegations are denied.

10. Admitted, except that lacking information about market size, rank, and market share, the allegations that in 1970 Dahlberg was the third largest manufacturer of hearing aids, and that its sales represented approximately 8% of the hearing aid market, are denied.

14. Denied.

15. Denied, except that Dahlberg admits that it manufacturers, distributes, sells and repairs hearing aids in the United States, and that it believes the other defendants are similarly engaged.

16. Denied, except that Dahlberg admits that it ships hearing aids to dealers from its principle place of business, and that it believes the other defendants are similarly engaged.

17. Lacking information, denied.

18. Denied, except that Dahlberg admits to selling hearing aids to retail dealers for resale.

19. Lacking information, denied.

20-22. Denied.

23. Denied, except that with respect to paragraph 23(D), Dahlberg admits that from time to time it has advertised its brand of hearing aids, but denies that its advertising is "extensive"; that with respect to paragraph 23(G)(7), Dahlberg admits that its authorized dealer agreements contain a standard, 30-day termination clause; and that in relation to Paragraph 23(G)(8), Dahlberg admits that its authorized dealer agreements contain an option permitting it to repurchase its products. Dahlberg denies that any of these above acts or provisions are in any way unlawful, and, in all events, Dahlberg avers that the agreements speak for themselves.

24-26. Denied.

First Affirmative Defense

The Complaint fails to state a claim on which relief can be granted.

Second Affirmative Defense

Plaintiff lacks standing to sue Dahlberg for any of the alleged causes of action.

Third Affirmative Defense

Plaintiff and her attorneys do not meet the standards required under FRPC Rule 23 for this action to be sustained as a class action.

Fourth Affirmative Defense

Any claims which plaintiff alleges against Dahlberg in the complaint are barred by the applicable statutes of limitations, and by the doctrines of laches and estoppel.

Fifth Affirmative Defense

Injunctive relief against Dahlberg is not required and is inappropriate by reason of a consent order entered into by the Federal Trade Commission, effective August 14, 1974, in FTC Docket No. 8929.

WHEREFORE, defendant Dahlberg prays that this Court make and enter its judgment herein dismissing the complaint, awarding costs and attorneys fees to defendant Dahlberg, and granting such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DEFENDANT
SONOTONE CORPORATION

(Title omitted in printing)

Defendant Sonotone Corporation ("Sonotone"), by its attorneys, for its answer to the complaint herein:

FIRST DEFENSE

1. Makes no response to paragraph 1, which is a definition proposed by plaintiff.

2. Denies each and every allegation contained in paragraph 2, except admits that the action purports to be brought under the statutes there referred to.

3. Denies each and every allegation contained in paragraph 3, except denies knowledge or information sufficient to form a belief as to those allegations insofar as they relate only to other defendants.

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4.

5. Denies each and every allegation contained in paragraph 5, except admits that the action purports to be brought on behalf of a class.

6. Denies each and every allegation contained in paragraph 6.

7. Denies each and every allegation contained in paragraph 7.

8. Denies each and every allegation contained in paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 9, except admits on information and belief that Beltone manufactures hearing aids.

10. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 10, except admits on information and belief that Dahlberg manufactures hearing aids.

11. With respect to paragraph 11, admits that it is a corporation organized under the laws of the State of New York, has its principal place of business in Elmsford, New York, and has manufactured hearing aids since about 1929, and otherwise denies knowledge or information sufficient to form a belief as to the allegations contained in that paragraph.

12. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12.

13. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 13, except admits on information and belief that Radioear manufactures hearing aids.

14. Denies each and every allegation contained in paragraph 14 insofar as any of said allegations are directed to it.

15. Denies each and every allegation contained in paragraph 15, except admits that it manufactures and sells hearing aids in various states of the United States and that it sells hearing aids to certain retail dealers, and except denies knowledge or information sufficient to form a belief as to the allegations insofar as they pertain only to other defendants.

16. Denies each and every allegation contained in paragraph 16, except admits that it ships hearing aids to retail dealers.

17. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17.

18. Denies each and every allegation contained in paragraph 18, except denies knowledge or information sufficient to form a belief insofar as said allegations pertain only to other defendants.

19. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 19.

20. Denies each and every allegation contained in paragraph 20.

21. Denies each and every allegation contained in paragraph 21.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23.

24. Denies each and every allegation contained in paragraph 24.

25. Denies each and every allegation contained in paragraph 25.

26. Denies each and every allegation contained in paragraph 26.

SECOND DEFENSE

27. The complaint fails to state a claim on which relief can be granted.

THIRD DEFENSE

28. This Court lacks jurisdiction over Sonotone.

FOURTH DEFENSE

29. The purported service of process herein upon Sonotone was insufficient.

FIFTH DEFENSE

30. Plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to the matters alleged in the complaint.

SIXTH DEFENSE

31. Neither this litigation nor plaintiff satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, and hence the action may not be maintained as a class action.

SEVENTH DEFENSE

32. The alleged cause or causes of action are barred by the applicable statute of limitations and/or by the operation of Title 15, United States Code, Section 15(b).

EIGHTH DEFENSE

33. The claims asserted in the complaint are barred by laches and by estoppel.

NINTH DEFENSE

34. The claims alleged in the complaint are moot.

WHEREFORE, defendant Sonotone Corporation prays that this Court enter judgment dismissing the complaint against it, awarding costs and disbursements and attorneys' fees to defendant Sonotone Corporation, and awarding such other and further relief as to this Court may seem just and proper.

Dated: January 22, 1976.

BREED, ABBOTT & MORGAN
By Richard W. Lyon
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Beltone Electronics Corporation, Dahlberg Electronics, Inc., Textron Inc., and Radioear Corporation respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on June 19, 1978.

Opinions Below

The opinion of the United States District Court for the District of Minnesota (App. A-2 of Petition) is reported at 435 F. Supp. 933. The opinion of the United States Court of Appeals for the Eighth Circuit (App. A-12 of Petition) is reported at 579 F.2d 1077.

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 19, 1978. A timely petition for rehearing *en banc* was denied on August 11, 1978. On August 28, 1978, the Eighth Circuit entered an order staying issuance of its mandate for 60 days, and the petition for certiorari was filed within that time. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) (1970).

Question Presented

Whether an antitrust plaintiff, asserting no injury to a commercial interest or enterprise, satisfies the threshold standing test of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), which requires injury to "business or property."

Statute Involved

Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

Statement of the Case

Petitioner Kathleen R. Reiter commenced this class action for treble damages on May 2, 1975 against respondents, certain hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. §15 (1970). Reiter would seek to represent a nationwide class of persons who, like herself, purchased hearing aids for personal use, not directly from the manufacturers, but from independent retail dealers.

In her complaint, Reiter alleges that the respondent manufacturers violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, & 14 (1970). Reiter claims that the manufacturers restricted the territories and customers of their retail dealers, required those dealers to deal exclusively in their respective hearing aids, used their dealer's customer lists for their own purposes, prohibited non-authorized dealers from dealing in or repairing their hearing aids, and fixed the retail prices of the dealers.[1] Subsequent to Reiter's filing of the complaint, all manufacturers answered and denied each of her material allegations.

The manufacturers moved for judgment on the pleadings or for summary judgment in the district court. Among other things, they urged that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for damages under Section 4 of the Clayton Act because she was not injured in her "business or property" within the meaning of the Act. The district court denied the manufacturers' motions but certified the standing issue for interlocutory review under 28 U.S.C. §1292(b) (1970). The Eighth Circuit authorized the interlocutory appeal and reversed the district court, holding that retail purchasers like Reiter

[1] It is instructive to compare the complaint which contains a full panoply of vertical dealer claims, with the "Question Presented" in Reiter's petition, which suggests that this is a simple price-fixing case. (*See* Resp App. at A-8 to A-10) The allegations made by Reiter are similar to those made by the FTC in a proceeding filed some two years before this action. The Administrative Law Judge found, in the only matter adjudicated on the merits, that Beltone Electronics Corporation, a respondent herein, did not engage in price-fixing. (See In re Beltone Electronics Corp., *et al.*, FTC Docket No. 8928, Initial Decision, Sept. 2, 1976 at 88.)

are not injured in their "business or property" for purposes of Section 4.[2] From this decision, Reiter now petitions this Court.

Reasons for Denying the Writ

The basic issue presented in the petition—the meaning of the restrictive "business or property" language in Section 4 of the Clayton Act—is not novel. Indeed, the opinion below is simply the latest of many Federal appellate decisions which repeatedly have concluded that the phrase "business or property" is limited to commercial or competitive interests. The legislative history of Section 4 of the Clayton Act confirms this view. Accordingly, petitioner presents no compelling question of Federal law warranting review by this Court.

I.

The Federal Appellate Courts, Like the Court Below, Repeatedly Have Interpreted the Phrase "Business or Property" in Section 4 of the Clayton Act to Require Injury to a Commercial Interest or Enterprise

This Court already has construed the meaning of the phrase "business or property" in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In denying the State of Hawaii a right to sue for injury to its general economy allegedly attributable to a violation of the antitrust laws, it declared:

[2] The Eighth Circuit did not reach the bar to petitioner's action raised below by respondents as a result of this Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers are not permitted to attempt to establish injury within the meaning of Section 4 by demonstrating a "pass-on" of alleged price overcharges from purchasers who deal directly with the alleged violators of the antitrust laws. *Id.* at 728-29. For this additional reason, the petitioner lacks standing to sue under Section 4.

> "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." *Id.* at 264.

Based upon this conclusion, the Court held that "[w]hen the State seeks damages for injuries to its *commercial interests*, it may sue under §4." *Id.* (Emphasis added.)[3]

The circuit courts of appeal which have considered the meaning of the phrase "business or property" have repeatedly determined that it refers only to commercial interests or enterprises. Reiter's focus on federal district court opinions, none of which has been rendered since the Eighth Circuit's opinion below, is misplaced since those cases do not create a conflict among the circuits. The language of this Court in *Hawaii* as well as that of the circuit courts, although arising in different factual contexts, clearly supports the holding of the Eighth Circuit.[4]

[3] *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), is wholly consistent with this Court's view that Section 4 limits standing to persons who sustain injury to commercial interests or enterprises. *Chattanooga* involved a sale of iron pipe to a municipality for use in the city's waterworks system. To the limited extent that the case even addresses the meaning of the phrase "business or property," *Chattanooga* stands for the proposition that a municipal corporation acting in its proprietary capacity (which indeed is often the capacity of any governmental entity) is injured in its commercial property when victimized by price-fixing. 203 U.S. at 394. *Chattanooga* has no bearing on whether a retail purchaser like Reiter is entitled to bring an action under Section 4.

[4] The petition attempts to create the appearance of a conflict among the circuits by referring to the decision of the District of Columbia Circuit in *Cleary v. Chalk*, 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974). The "conflict" stems from dicta in a footnote to the *Cleary* opinion. 488 F.2d at 1319, n.17. All dicta—and particularly footnotes — "must be viewed in the light of the factual and legal setting encountered." *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975), *cert. denied*, 424 U.S. 912 (1976). In *Cleary*, the court upheld the dismissal of an antitrust damage action brought by bus riders on the ground that the bus company's sale of land to its wholly-owned subsidiaries in return for all their stock did not violate Section 10 of the Clayton Act, 15 U.S.C. § 20 (1970).

The opinion below, which the Eighth Circuit recently has reaffirmed in another case,[5] relies in part on a prior decision of that circuit confirming this Court's expressed view that a purported antitrust plaintiff must assert competitive injury. The prior controlling case in the Eighth Circuit was *Ragar v. J. T. Raney & Sons,* 521 F.2d 795 (8th Cir. 1975), *aff'g* 388 F. Supp. 1184 (E.D. Ark.). In that case, the Arkansas District Court denied standing to residential homeowners who sued investment banking firms for allegedly conspiring to fix a high rate of interest on municipal bonds in violation of the antitrust laws. In dismissing the complaint, the trial court reasoned that plaintiffs must show:

> ". . . that they have been injured in their business or property as that phrase is used in Section 4 of the Clayton Act. The Supreme Court of the United States has emphasized that in determining who may sue under the antitrust laws, the central inquiry is one of *competitive injury*. Perkins v. Standard Oil Co., 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed. 2d 599 (1969). Since the purpose of the antitrust laws is the 'prevention of restraints to free competition in business and commercial transactions,' Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940), it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act." 388 F.Supp. at 1187. (Emphasis in original.)

The Eighth Circuit affirmed without reservation "on the basis of the district court's soundly reasoned opinion." 521 F.2d at 796.

[5] *Beckers v. Int'l Snowmobile Industry Ass'n,* 581 F.2d 1308 (8th Cir. 1978).

Similarly, the Second Circuit in *GAF Corp. v. Circle Floor Co.,* 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973), declared that injury to competitive position in business is critical to suit under Section 4 of the Clayton Act:

> This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he or she was engaged . . . [citations omitted] . . . The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." 463 F.2d at 758, 759. (Emphasis in original.)

Likewise, the Fifth Circuit in *Tugboat Inc. v. Mobile Towing Co.,* 534 F.2d 1172, 1175 (5th Cir. 1976), recognized that "[c]learly, the injury must be to commercial interests or enterprises." In *Reibert v. Atlantic Richfield Co.,* 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973), the Tenth Circuit, in an action where plaintiff alleged that he had lost his job because of an anticompetitive merger, also concluded that plaintiff "to satisfy the business or property prerequisite. . . must demonstrate that his job is a commercial venture or enterprise." 471 F.2d at 730.

The Ninth Circuit also has declared that a private plaintiff must allege injury to a competitive enterprise in order to satisfy the "business or property" limitation of Section 4. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert denied,* 414 U.S. 1045 (1973). Referring to this Court's interpretation of the phrase "busi-

ness or property" in *Hawaii v. Standard Oil Co., supra*, the court stated:

> "First, a plaintiff must allege injury to his 'business or property', a term definitively limited to interests in commercial ventures or enterprises. . ." 481 F.2d at 126.

Further, the court observed:

> "To attain standing, a plaintiff must thus allege that the antitrust violation injured a *commercial enterprise* of the plaintiff in the area of the economy in which the elimination of competition occurred. *Id.* at 128. (Emphasis added.)

In light of the foregoing, the Eighth Circuit's conclusion that a retail purchaser like Reiter has sustained no injury to "business or property" within the meaning of Section 4 is scarcely surprising. Given the consistency of the Eighth Circuit's opinion with the conclusions of this Court and other Federal appellate courts, further review of the matter by this Court is unnecessary and inappropriate.

II.

The Legislative History of Section 4 of the Clayton Act Plainly Confirms that Only a Person Injured in a Commercial Interest or Enterprise Has Standing to Sue

The judicial view that "business or property" is synonomous with commercial interest or enterprise is fully supported in the legislative history of Section 4.[6] The Eighth

[6] Reiter's contention that the term "property" encompasses all pecuniary interests would render the statutory term "business" superfluous. By contrast, the "commercial interests" interpretation of this Court preserves the significance of both "business" and "property," since one may possess commercial property unconnected with his business or primary livelihood.

Circuit below carefully reviewed this history and correctly concluded that the purpose of Section 4 was to protect the small businessman, not the ordinary retail purchaser.

The predecessor to Section 4 of the Clayton Act was Section 2 of the Sherman Act. The bill initially introduced by Senator Sherman on December 4, 1889, S.1, 51st Cong. 1st Sess. §2 (1889), permitted damage actions by "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination." Congress did not adopt this broad language, however, and the bill was thoroughly revised in the Judiciary Committee. Thus, on April 2, 1890, when the Committee reported out the bill in substantially the form in which it was finally enacted, the Committee had limited recovery to "any person . . . injured in his business or property." This restrictive language was later incorporated into the private damage provision which became Section 7. *See* 21 Cong. Rec. 2901 (1890).

As the Eighth Circuit observed below, Congress' deliberate rejection of the broad language contained within Sherman's bill cannot be ignored. The bill which might have accorded retail purchasers like Reiter standing to sue for damages was rejected. This action evidenced a congressional recognition that the remedy of damage suits by individuals injured solely in their capacities as retail purchasers was both undesirable and unworkable.

When Congress enacted the Clayton Act in 1914, it incorporated Section 7 of the Sherman Act, with minor modifications, as Section 4 of the Clayton Act. Although the Clayton Act added a broad new private injunctive remedy for any person threatened with loss or damage from antitrust violations, 15 U.S.C. §26, Congress did not similarly

expand the category of person or kind of injury covered by the treble damage remedy.

In short, the legislative history emphatically supports the Eighth Circuit's opinion in this case. A retail purchaser who is not engaged in any commercial venture or enterprise is simply beyond the scope of the damage remedy in Section 4 of the Clayton Act. Petitioner cannot convincingly transform this obvious conclusion into a contested issue worthy of this Court's examination.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

KATHLEEN R. REITER, individually and as representatives of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation and RADIOEAR CORPORATION a Delaware corporation,

Defendants.

COMPLAINT—ANTITRUST CONSUMER CLASS ACTION.

Civil No. CIV. 4-75-206

The plaintiff, by her attorneys, for her complaint against defendants, demanding a trial by jury respectfully alleges:

DEFINITION

1. As used herein, "hearing aid" means all products ordinarily manufactured and/or sold by hearing aid manufacturers, including defendants herein, for personal use.

JURISDICTION AND VENUE

2. This Complaint is filed and jurisdiction of this Court is invoked pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) to recover treble damages sustained by plaintiff and other members of the class represented by her, and injunctive relief if appropriate by reason of the violations by defendants of Section 1 of the Sherman Act (15 U.S.C. 1).

3. Each of the defendants either transacts business or is found within the District of Minnesota, or the effects of the illegal activities alleged herein were felt in said district.

PLAINTIFF AND CLASS

4. Plaintiff is an individual residing in Richfield, Minnesota, who purchased two hearing aids during the year 1973.

5. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on her behalf and as representatives of a class. The class consists of all persons in the United States or any sub part thereof who directly or indirectly purchased, at prices affected by the activities complained of, hearing aids.

6. Said class members are in a similar position to that alleged herein by plaintiff, and are members of a class so numerous that joinder of all parties is impracticable.

7. The rights of said class members, including plaintiff, involve common questions of law and fact which pre-

dominate over any questions affecting only individual class members, and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

8. The claims of plaintiff are typical of those to be asserted for the class, and plaintiff will fairly and adequately protect the interests of the class.

DEFENDANTS

9. BELTONE ELECTRONICS CORPORATION (hereinafter "Beltone") is named a defendant herein. Beltone is a corporation organized under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Beltone has manufactured hearing aids since 1941. In 1970, Beltone had sales of hearing aid products in excess of ten million ($10,000,000.00) dollars, more than any other seller of hearing aids in the United States, representing approximately twenty per cent (20%) of the hearing aid market.

10. DAHLBERG ELECTRONICS, INC. (hereinafter "Dahlberg") is named a defendant herein. Dahlberg is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. Dahlberg and its corporate predecessors have manufactured hearing aids since 1949. In 1970, Dahlberg was the third largest hearing aid manufacturer with sales in excess of four million ($4,000,000.00) dollars, representing approximately eight per cent (8%) of the hearing aid market.

11. SONOTONE CORPORATION (hereinafter "Sonotone") is named a defendant herein. Sonotone is a corporation organized under the laws of the State of New York, with its principal place of business in Elmsford, New York, Sonotone has manufactured hearing aids since 1929. In 1970, Sonotone was the fifth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars, representing approximately six per cent (6%) of the hearing aid market.

12. TEXTRON, INC. (hereinafter "Textron") is named a defendant herein. Textron is a corporation organized under the laws of the State of Delaware, with its principal place of business in Providence, Rhode Island. Maico Hearing Instruments (hereinafter "Maico") is, and has been since 1966, an unincorporated division of Textron, with its principal place of business in Minneapolis, Minnesota. Maico was the fourth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars representing more than six per cent of the hearing aid market.

13. RADIOEAR CORPORATION (hereinafter "Radioear") is named a defendant herein. Radioear is a corporation incorporated under the laws of the State of Delaware, with its principal place of business at Coanosburg, Pennsylvania. Radioear has manufactured hearing aids since 1924. In 1970, Radioear was the seventh largest hearing aid manufacturer in the United States with the sales in excess of two million ($2,000,000.00) dollars, representing approximately four per cent (4%) of the hearing aid market.

CO-CONSPIRATORS

14. Various corporations, firms and individuals not made defendants in this complaint participated as co-conspirators in the violations alleged herein, and performed acts and made statements in furtherance thereof.

NATURE OF TRADE AND COMMERCE

15. Defendants are now and for some time have engaged in the business of manufacturing, distributing, selling and repairing hearing aids in various states of the United States and in foreign countries. Defendants distribute and sell hearing aid products to selected retail dealers located throughout the United States, who then resell to the general public. Wholesalers are rarely used in the distribution process.

16. In the course and conduct of their businesses, defendants ship or cause to be shipped, from their respective facilities located in their principal place of businesses aforementioned, in a continous and uninterrupted flow of interstate commerce, hearing aids to selected retail dealers throughout the United States.

17. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to fifty million ($50,000,000.00) dollars at the manufacturers' prices, and an estimated $175 million at retail prices.

In 1970, approximately fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

18. The success of the established hearing aid manufacturers, including defendants, in selling their products is based primarily on their ability to secure the services of retail dealers to sell their products to the hearing handicapped. Similarly, new entrants in the market to be successful must secure distribution through established dealers.

19. Approximately sixty per cent (60%) of the retail sales of hearing aids occur as a result of initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from the use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers if dealers. Inasmuch as the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is approximately $100.00 the average retail price is approximately $350.00. Over fifty per cent (50%) of the persons with hearing impairment who purchase hearing aids are over sixty five years of age.

OFFENSES CHARGED

20. Beginning at a time unknown to plaintiff, and continuing up to and including the date of the filing of this

Complaint, the defendants and other persons acting for each of them, have been and are now engaged in:

A. A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in hearing aids in violation of Section 1 of the Sherman Act;

B. A continuing combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in hearing aids in violation of Section 2 of the Sherman Act.; and

C. Leases, sales and contracts relating to the interstate commerce of the United States in hearing aids in violation of Section 3 of the Clayton Act.

21. Each act of defendants and co-conspirators herein alleged was done in furtherance of the offenses charged in the preceding paragraph, was a part thereof and was done with the primary purpose and intent of restraining, monopolizing, attempting to monopolize and substantially lessening competition in the trade and commerce described herein. It was the intent, jointly and severally, of defendants and co-conspirators, *inter alia*, to:

A. Eliminate competition in hearing aids in the United States;

B. Use their monopoly power in hearing aids to eliminate competition;

C. Combine their economic power to eliminate competition in hearing aids; and

D. Obtain substantial and unconscionable profits for themselves, at the expense of plaintiffs, as a direct result

of the restrictions upon competition in the trade and commerce herein alleged.

ACTS OF DEFENDANTS AND CO-CONSPIRATORS

22. In the course and conduct of its business of manufacturing, distributing, selling and repairing hearing aids, defendants have been and are presently pursuing the following courses of action:

A. Requiring their respective selected dealers to sell their respective hearing aids within assigned geographic areas;

B. Requiring their respective selected dealers to deal exclusively in their respective hearing aids;

C. Fixing, establishing, controlling and maintaining the retail prices at which their dealers sell their respective hearing aids;

D. Prohibiting their dealers from dealing with certain potential customers;

E. Prohibiting non-dealers from dealing in, or repairing their respective hearing aids.

F. Appropriating and using for their purposes the names and addresses of their dealer's customers.

23. In furtherance of these courses of action, defendants have been and are now engaged, *inter alia,* in the following acts and practices:

A. Distributing and selling their hearing aids directly to selected retail dealers, and refusing to deal with all other dealers;

B. Refusing to issue the express product warranties to consumers unless and until their dealers have reported the names and addresses of their customers to them;

C. Encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

D. Engaging in extensive national brand advertising of their hearing aids;

E. Causing their dealers' retail prices for hearing aids to be set at more than 300% above the manufacturers' prices as to the dealers;

F. Selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers;

G. Entering into agreements or understandings with their respective dealers, which agreements, *inter alia,* either expressly or by implication:

1. Establish restrictive territories within which the dealers may advertise and sell their products;

2. Require exclusive dealing in defendants' products;

3. Assign sale or purchase quotas to be met by their dealers;

4. Encourage or require the use of the manufacturers' brand name in the dealers' trade styles;

5. Restrict the classes of customers with whom their dealers may deal;

6. Require their dealers to submit the names and addresses of their customers to the defendants;

7. Permit the defendants to terminate such agreements without cause upon thirty days notice; and

8. In the event of such termination, permit the defendants to repurchase the terminated dealers' products purchased from such defendants.

H. Expressing, communicating or emphasizing to their selected dealers their business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, *inter alia*, persuasion, pressure, harassment, coercion, or intimidation of such dealers to sell only defendants' products, and not to sell other brands.

24. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

EFFECTS OF OFFENSES

25. The acts and practices of defendants enumerated in paragraphs 22 and 23, taken either individually or collectively, are oppressive, coercive, unfair and anti-competitive, and have the tendency and capacity of hindering, suppressing or eliminating competition. The intended and actual effects of the offenses heretofore alleged were and are that defendants and co-conspirators:

A. Hindered and suppressed competition between defendants and other hearing aid manufacturers;

B. Eliminated competition among and between dealers dealing in defendants' hearing aids;

C. Deprived such dealers of their freedom to select their customers and otherwise to function as free and independent dealers;

D. Deprived such dealers of their ownership of, and freedom to maintain, confidential lists of their customers;

E. Hindered and suppressed competition among dealers dealing in defendants' hearing aids;

F. Deprived retail dealers of hearing aids of their freedom to act in the best interests of the hearing handicapped and their own business interests and pursuits;

G. Deprived consumers of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviations of their hearing impairment;

H. Deprived consumers of the benefits of free competition.

I. Deprived those engaged in the repairing or servicing of hearing aids in competition with defendants of their right to repair or service defendants' hearing aids;

J. Raised, fixed, stablized and maintained at noncompetitive levels prices of hearing aids and equipment sold by defendant corporations and co-conspirators to plaintiff and members of the class;

K. Restricted and suppressed competition between and among defendants and co-conspirators, and deprived purchasers of aids and equipment, including plaintiff and members of the class, of the benefits of free and open competition.

L. Proximately damaged plaintiff and members of the class in their properties through having to pay a higher

price for hearing aids and services than what they would otherwise have had to pay in a free competitive market place.

M. Plaintiff and members of the class have been and are presently being damaged by the effects of the defendants' offenses.

FRAUDULENT CONCEALMENT

26. At all times relevant hereto Plaintiff had no knowledge of the combination and conspiracy herein alleged or of any action that might have led to the discovery thereof until the filing of actions by the Federal Trade Commission on May 8, 1973. Plaintiff and the other members of the class she represents could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy and activities were concealed by the defendants through their adoption of elaborate schemes including the resort to secrecy to avoid detection.

PRAYER

WHEREFORE, Plaintiff prays that this Court Order adjudge and decree:

A. That Plaintiff and the class she represents have judgment against the defendants for three fold the amount of damages determined that have been sustained as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15);

B. That Plaintiff and the class she represents recover their costs of suit including reasonable attorneys' fees as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15); and

C. That Plaintiff and the class she represents have such other and further relief, including injunctive, as the Court deems proper.

Dated: May 2nd, 1975.

COCHRANE & BRESNAHAN
By /s/ JOHN A. COCHRANE
JOHN E. THOMAS
Attorneys for Plaintiffs
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Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Petitioner,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CEI CERTIORARI

JOHN E. THOMAS
Attorney for Petitioner
Fifth Floor
360 Wabasha Street
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IN THE

Supreme Court of the United States

October Term, 1978
NO. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

BRIEF FOR PETITIONERS

Petitioner, a consumer, petitioned this Court to issue a Writ of Certiorari to review the decision of a two judge panel[1] of the Eighth Circuit filed on June 19, 1978, denying standing to consumers of the United States under Section 4 of the Clayton Act. A Petition for Rehearing En Banc was denied on August 11, 1978, by a 4-3 split in the Court. The petition was granted on January 8, 1979.

[1] Judge Webster heard argument but took no part in the decision.

OPINIONS BELOW

The Statement by the three judges favoring a rehearing *en banc* is reported at 1978-1 Trade Cases para. 62,183. The opinion by the two-judge panel is reported at 579 F.2d 1077. The opinion by the Honorable Earl R. Larson, of the District of Minnesota, is reported at 435 F. Supp. 933. The opinions are printed in the Appendix to the Petition for a Writ of Certiorari at pages A-31, A-12 and A-2, respectively.

JURISDICTION

On June 28, 1977, the Eighth Circuit, pursuant to 28 U.S.C. Sec. 1292 (b), granted the defendant companies' application for leave to take interlocutory appeal, from which the appeal was perfected. The date of the entry of the judgment of the two judge panel of the Eighth Circuit was June 19, 1978. The plaintiff consumer's Petition for Rehearing En Banc was denied by Order entered August 11, 1978, with three of the seven judges dissenting therefrom. The Petition for a Writ of Certiorari was filed on October 24, 1978, and the writ was granted on January 8, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Section 4, Clayton Act. (October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.)

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

QUESTION PRESENTED

Are not consumers who purchase price-fixed goods for personal use injured in their "property" within the meaning of Section 4 of the Clayton Act?

STATEMENT OF THE CASE

The best description is found in the concise statement by the Honorable Earl R. Larson in his Memorandum Order of March 31, 1977, wherein he upheld consumers after describing the case as follows:

> Plaintiff, along with all potential members of the class she seeks to represent, is a purchaser of a hearing aid manufacturered by one of the defendants and distributed by methods that allegedly contravene the antitrust laws. She is not in any business related to that of defendants or their distributors and alleges no property interest other than that of an individual who, because of defendants' actions, was forced to part with more money to purchase a hearing aid than she would have had to pay had they not engaged in allegedly illegal business practices. *She is the classic consumer plaintiff.* (emphasis herein) (Cert. Pet. A-3)

SUMMARY OF ARGUMENT

Mr. Justice Holmes could not have made it more clear when he said that:

> "The facts gave rise to a cause of action under the Act of Congress. . . . [The City] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. . . .
>
> "A man is injured in his property when his property is diminished."[2]

The Courts, Congress and antitrust legal scholars have justifiably assumed[3] that consumers could recover under section 4 of the Clayton Act. Congress provided for "opt out in the 1976 parens patriae legislation which the Circuit herein has now made appear silly if no separate right of private action exists. (sec. 4 C (b) (2) of 15 U.S.C. sec. 15 c) The question is raised *directly* now to this Court only because of misinterpretation by the four Eighth Circuit judges of certain judicial comments.[4]

---

[2] *Chattanooga Foundry & P. Works v. Atlanta,* 203 U.S. 390, 396 (1906); Cf. *Congress Building Corp. v. Loew's Inc.,* 246 F. 2d 587, 594 (7th Cir. 1957); *Utah Gas Pipelines, Corp. v. Natural Gas Co.,* 233 F. Supp. 955, 964 (D. Utah 1964).

[3] Eg. See Jay, *Parens Patriae An Effective Consumer Remedy In Antitrust,* 16 Washburn Law Journal 135, fn. 3 (1976).

[4] Eg. Cert. Pet. A-22, the Panel cites only one sentence from this Court in *Hawaii v. Standard Oil Co.,* 405 U.S. at 264, (1972).

ARGUMENT

"This issue *will undoubtedly be decided by the Supreme Court,* and to the extent that it is possible to divine the result, *I conclude that the Court believes that retail consumers do have standing to sue under the Clayton Act . . . .*

In short, both the dicta and the presuppositions in the recent Supreme Court opinions suggest that *the Court will hold* that a consumer such as the present plaintiff may sue under the Clayton Act."

The quotation is from the opinion by Judge Nickerson in *Theophil v. Sheller—Globe Corp.,* 446 F. Supp. 131, 135 (E.D. N.Y. 1978). (emphasis herein) He lined up with the many other Judges that have cited and followed Judge Larson herein.[5] To this date, no Circuit Court, other than the *Eighth* herein, has decided the question. The District Judge that has not followed Judge Larson herein is Judge Williams of the Northern District of California in a "triology" of opinions cited in the Panel opinion herein.[6]

In a Memorandum Opinion, July 5, 1978, Judge Richey again had the question before him in the *Ampicillin Antitrust Litigation,* M.D.L. Dkt. No. 50, Misc. 45-70 (D.C. 7/5/78) and again concluded as follows:

---

[5] See also;
In re Ampicillin Antitrust Litigation, 1977-1 Trade Cases Para. 61,434 (D.C. 5/17/77); *De Gregario v. Segal,* 443 F. Supp. 1257 (E.D. Pa. 1978); *Kaplan v. Rolex,* Los Angeles Superior Ct. CA000,-467, Minute Order by Judge David Thomas 8/11/78; *In re Petroleum Products Antitrust Litigation,* 1977-2 Trade Cases Para. 61,639 (C.D. Cal. 9/16/77); *Rosack v. Volvo of America Corp.,* 1977-1 Trade Cases Para. 61,395 (Cal. Superior Ct. 3/16/77).

[6] The Ninth Circuit, by Order dated December 8, 1978, has withheld submission pending decision by this Court herein. *Weinberg v. Federated Dept. Stores, Inc., et al.,* No. 77-1547.

"The Court concludes, based on *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In re Petroleum Products Antitrust Litigation*, 1977-2 CCH Trade Cas. Para. 61,639 (C.D. Cal. 1977); and *Reiter v. Sonotone*, 435 F. Supp. 933 (D. Minn. 1977), that the prevailing and better view is that these plaintiffs do have standing to seek treble damages under Para. 4 of the Clayton Act."

The commentary by the District of Columbia Circuit Court should be added to the list. *Cleary v. Chalk*, 488 F. 2d 1315, 1319 n. 17 (D.C. Cir. 1973), *cert. den.*, 416 U.S. 938 (1974).

In his widely cited treatise on antitrust law, Professor Sullivan has expressed his view that:

"Analysis suggests that a non-business consumer who has paid a higher price because of an anti-trust violation also has a cause of action under section 4."

He goes on to discuss Mr. Justice Holmes and Congress and concludes:

"This rationale clearly covers the 'property' of an ultimate consumer as well as that of a business firm. *Courts and commentators seem to have accepted this position without much discussion.*" (emphasis herein)

The professor then considers that the opinions of this Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) support consumer standing. See L. Sullivan, Antitrust 771 n. 3 (1977).

The Panel opinion tries to lay the blame on Mr. Justice Marshall's passing comment in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) where he had said:

"Like the lower courts that have considered the meaning of the words 'business or property' we conclude that they refer to commercial interests or enterprises."

Anyone familiar with the antitrust decisions of the Supreme Court would find it cruel indeed to rely in particular on a statement by Mr. Justice Marshall to *deny* consumers standing under the antitrust laws. Further on in that opinion he raises a stentorian call-to-arms for classes of private citizens such as the consumer class herein. The opinion proclaimed in conclusion:

"We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.

Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 USC §1337; 15 USC §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents, in moving to dismiss count three of the fourth amended complaint, in which the State sought to bring such an action, virtually conceded that class actions might be ap-

propriate under certain circumstances. The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorneys' fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries."
405 U.S. 265, 266.

The Panel herein cites the *Pfizer, Inc. v. Government of India,* 54 L.Ed.2d 563 (1978) opinion many times. However, the Panel overlooked the key phrase in the *Pfizer* opinion which, of course, is the one stating that:

"Clearly therefore, Congress did not intend to make the treble damage remedy *available only to consumers* in our own country". (54 L. Ed. 2d 563, at 570) (emphasis herein).

This Court could not have made itself more clear. Indeed, if one reads the Panel opinion in footnote 12 where *Pfizer* is first cited, one would have to believe that the Panel was bound to affirm Judge Larson, cf. *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, Footnote 10 (1977); *Goldfarb v. Virginia State Bar,* 421 U.S. 733, 782, 783, 787, 788 and 792 (1975); *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 264 (1972); *Mandevill Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948).

The question herein emanated from the opinion by Judge Henley while still a District judge, in *Ragar v. T. J. Raney and*

Sons, 388 F.Supp. 1184, 1187 (E. D. Ark), aff'd, 521 F.2d 795 (8th Cir. 1975).

See this Petitioner's counsel's letter back on November 5, 1975, to Judges Matthes, Heaney, Stephenson and Henley (Pet. Add. p. 2). From that date forward, the Eighth Circuit had the question in mind. The Panel bootstraps itself here. Judge Williams cited and relied on the *Ragar* opinion and the Panel recognizes that reliance (Pet. A-22, fn. 11). Now, based upon the fact that Judge Williams "examined" the "language" in *Ragar,* the Panel goes full circle and cites and relies on *Ragar* as "approved" language in the Eighth Circuit. (Pet. A-23). This is done with no recognition of the four other judges, each following Judge Larson, who had already examined the language of *Ragar* and did not apprehend it as a bar to consumers.

It is perhaps most confusing that just four days before the Panel opinion herein, Judge Henley wrote the antitrust opinion in *Stifel, Nicolaus & Company. v. Dain, Dalman & Quail,* 1978-1 Trade Cases para. 62,094 (8th Cir. 1978). In footnote one in *Stifel* Judge Henley described section four of the Clayton Act as follows:

"Section 4 of the Clayton Act of 1914, 15 U.S.C. para. 15, gives to an *individual* who is *injured* as a result of violations of para. 1 or para. 2 of the Sherman Act a *private* cause of action in which, if successful, he may recover treble damages, costs and an attorney's fee."

Supra, at page 74,793 (emphasis herein). Petitioner finds it particularly significant that Judge Henley used the term "individual" rather than the statutory term "person". Consumers are "individuals" whereas corporate businesses are not. It is ironic that Judge Larson sat by designation in *Stifel.* Judge

Larson certainly would have expressed objection had Judge Henley apprehended section 4 differently than had Judge Larson herein. The definition in *Stifel* is what this Petitioner anticipated from Judge Henley and it should have dictated the result just four days later herein.

The legislative history of section 4 of the Clayton Act and its predecessor statute has recently been analyzed by this Court in footnote 10 of the opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).[7] The references therein by this Court clearly favor consumer standing herein.

> "10. Treble damage antitrust actions were first authorized by § 7 of the Sherman Act, 26 Stat 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers, 21 Cong Rec 1767 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Regan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit against a combination such as is described' in the Act. Id., at 2456 (Sen. Sherman).
>
> When Congress enacted the Clayton Act in 1914, it 'extend[ed] the remedy under §7 of the Sherman Act' to persons injured by virtue of any antitrust violation. HR Rep No. 627, 63d Cong, 2d Sess, 13 (1914). The initial House debates concerning provisions related to private damage actions reveal that these actions were conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.' 51 Cong Rec 9073 (1914) (remarks of Rep. Webb); see e.g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin); 9414-9417, 9466-9467, 9487-9595. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble damage suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, e.g., id., at 14818-14821 (Sen. Reed), 16042-16046 (Sen. Norris)."

[7] It was also analyzed in *Pfizer v. Government of India*, 54 L.Ed.2d 563 (1978).

At this point, one can trace the statement by Justice Marshall in *Hawaii, supra,* right back to the only court decision squarely on this very question. Justice Marshall cited (405 U.S. at 264) three cases, the second of which is *Hamman v. U.S.*, 267 F.Supp. 420 (D. Mont. 1967) where survivors of accidently killed construction workers were denied loss of consortium because it was held not to be an antitrust-type property interest. In *Hamman* the Court noted 267 F.Supp. at 432, that the plaintiff correctly cited *Waldron v. British Petroleum Co.*, 1964 CCH Trade Cas. p. 71,165 (S.D.N.Y. 62364) for the principle that "property" is a much broader term than "business". The court in *Waldron, supra,* had expressly held:

> "The above analysis would be dispositive of this issue if §4 of the Clayton Act protected only a person injured in his 'business.' However §4 has a broader sweep. It provides that 'any person who shall be injured in his business *or property* . . . may sue' (Emphasis original.)

The majority of cases cited by defendants do not advert to the distinction between 'business' and 'property' for the simple reason that that distinction was not in issue in those cases, as it is here.

The statute explicitly uses the words 'business or property' in the disjunctive.[8] Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'

The statute does not set up a qualitative or quantitative test to determine the existence of 'property.' Nor does the statute contain a built-in definition.

The word 'property' is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether plaintiff has 'property' involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property.' "

That court held that plaintiffs' contract was "property", although not a "business" because incipient, and afforded standing.

The Seventh Circuit followed *Chattanooga Foundry, supra,* and said in *Congress Building Corp. v. Loew's Inc.,* 246 F.2d 587, 594, that the "business" argument need not be considered since the plaintiff was injured in his property, because, *"A man is injured in his property when his property is diminished".* (Emphasis herein). *Utah Gas Pipelines Corp. v. Natural Gas Co.,* 233 F.Supp. 955, 964 (D.Utah, 1964).

[8] Blacks Law Dictionary, Revised 4th Edition notes under "DISJUNCTIVE TERM" that it "is usually expressed by the word 'or'."

Finally, on this point, Judge Neville, late of the District of Minnesota, cited and followed the oft-quoted statement of Mr. Justice Holmes. See *Minnesota v. U.S. Steel Corp.,* 299 F.Supp. 596, 604 (D. Mn. 1969) where Judge Neville also noted that:

> "Yet, as a practical matter, a suit by a governmental claimant who is a purchaser not engaged in business for profit is probably limited to the increased costs theory of damages."

In other words, non-business plaintiffs such as consumers herein, measure their damage by the amount of the overcharge.

The Ninth Circuit very recently cited the legislative intent to be the "maximization of consumer welfare" in *Boddicker v. v. Arizona State Dental Assn.,* 1977-1 CCH Trade Cas. para. 61,258 (9th Cir. 1/6/77) fn. 10 on p. 70,797:

> "In an exclusive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded:
>
> '[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.' Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. Law & Econ. 7, 10 (1966)."

The Congressional Record is replete with references to consumers being given standing. Before Section 4 of the Clayton Act, we had Section 7 of the Sherman Act, the first version of which was criticized for not being strong enough for *consumers* suing large corporate violators. See remarks by Senators Coke, Hiscock and Teller in 21 *Cong. Rec.* 2615, 2571 and 2572 respectively.

Senator Sherman said the intent of Section 2, the harbinger of Section 7, was to give "private parties a remedy for personal injury" caused by a violation. 21 *Cong. Rec.* 2456. Senator George made it clear that under Section 7, a consumer was thought to be "the party necessarily demnified or injured". 21 *Cong. Rec.* 1767-68.

The redraft of Section 7 strengthened the hand of consumers by providing for *treble* damages and expressed "business or property" injury. 21 *Cong. Rec.* 2901. At the time he presented the redraft to the Senate, Senator Hoar simply stated "I shall not undertake to explain the bill, which is well understood." 21 *Cong. Rec.* 3145.

This Court has previously noted in *U.S. v. Cooper Corp.*, 312 U.S. 606 (1941), the remarks by senator Sherman when he said as follows:

> 'But the second section provides purely a personal remedy, a civil suit also by citizens of the United States.' (312 U.S. at 612)

That opinion then notes that section 2 was "retained, with slight changes." (312 U.S. at 612). Earlier the opinion had noted that ". . . a private purchaser is given a remedy for his losses in treble damages . . ." 312 U.S. at 608, cf. fn. 17, 312 U.S. at 612. This Court found it significant that in the fifty years the statute had been in force no such action had been instituted. 312 U.S. at 613-14. Similarly herein, no such motion had ever been brought directly.

It is also significant that in the opinion in that case this Court warned that

> ". . . it is not for the courts to indulge in the business of policy making in the field of antitrust legislation." 312 U.S. at 606.

The Panel herein seem to have not heeded this warning. Indeed, it has become obvious that there is a deep policy rift in the Circuit. The policy comment by the Panel about "gigantic consumer class actions" (made right after extolling the "significant" 1976 legislation providing for government representation of such gigantic consumer class actions) is irrelevant to the question herein. (Cert. Pet. A-28-29). The same policy consideration was applied against an individual citizen by the same four judges in deciding a "long-arm" jurisdiction question in the product liability case of *Hutson v. Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir. 1978). The same three judges dissented, as herein, with Judges Lay and Heaney concluding in additional dissenting comment that:

> "The majority decision is a giant leap backward in the law." 584 F.2d at 841.

There simply was no substantive change as defendants attempted to argue below. Senator Morgan had commented that a *personal* remedy was being given to *whoever* may be injured in his business or property. (Emphasis herein.) 21 *Cong. Rec.* 3149.

Significantly, the Senate debate after the redraft of Section 7 concerned possible amendment to then provide for *class* actions by consumers (who obviously therefore must have had individual standing). 21 *Cong. Rec.* 3147-51. The concerned remarks about practicality of consumer suits noted by defendants (Dr. Br. 17-18) were to strengthen the provision and did *not* concern the question of standing.

Section 4 of the Clayton Act was only a reenactment of Section 7. See 51 *Cong. Rec.* 9164; 14,214; 15,938; 16,319; House Report No. 627 at p. 36; Senate Report No. 698.

This Court said in *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977) that the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1394-96 (1976):

> ". . . did not alter the definition of which overcharged persons were injured within the meaning of Section 4. It simply created a new procedural device—parens patriae actions by States on behalf of their citizens—to enforce existing rights of recovery under Section 4". (emphasis herein) 431 U.S. at 733 n. 14.

The *Illinois Brick* opinion also noted actions "by ultimate consumers," such as "homeowners", 431 U.S. at 740 and 741, esp. Fns. 23 and 24.

The amicus brief by the Department of Justice in support of the Petition herein emphasizes the great public interest at stake in private antitrust enforcement. This Court has called the antitrust laws the "magna carta" of the free enterprise system and recently noted "a congressional policy favoring private enforcement of the antitrust laws" and added that "*undoubtedly there exists a strong national interest in antitrust enforcement*". *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, at 635 (1977). (emphasis herein). A recently concluded study by the Center For Econometric Studies Of The Justice System, Hoover Institution, Stanford University (December 1978). That study was titled THE DETERRENT EFFECT OF ANTITRUST ENFORCEMENT: A THEORETICAL AND EMPIRICAL ANALYSIS. In a letter to this counsel, Mr. Michael K. Block, Director of the Center, expressed the conclusion that antitrust enforcement deters price fixing behavior "only when there is a credible threat of a private action". Mr. Block's letter is reprinted herein for the convenience of this Court (A-1).

Foreign governments have standing to sue as consumers and because of the reasoning of the Panel herein in attempting to rationalize away Mr. Justice Holmes' opinion in *Chattanooga Foundry*, such governments are now guaranteed continued standing while American consumers are to be denied access to the Courts of this nation. Such a result is incredible and this Court should strike it down forcefully on behalf of the people. The Eighth Circuit is split four to three and the Panel should be reversed accordingly.

CONCLUSION

A law review writer recently noted that the decision of the Panel herein "frustrates the goals of the antitrust laws and in many instances will allow antitrust violations to go unchecked."[9] O'Daniel, *Judicial Interpretation of Private Standing Under Section 4*, 31 Vanderbilt Law Review No. 6, 1542, at 1549 (November 1978). Petitioner asks that this Court reverse the 4-3 result of the Eighth Circuit by making it clear that commercial or competitive injury is *not* a prerequisite to an action for damages under Section 4 of the Clayton Act.

Dated: February —, 1979.

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[9] In *Pfizer v. Government of India, supra*, this Court noted the defeat of such goals and denial of just compensation if *foreign* governments were denied the right to sue. 54 L.Ed.2d at 570. Surely American citizens should not then be denied.

ADDENDUM

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Stanford, California 94305

January 16, 1979

Mr. John F. Thomas
Cochrane & Bresnahan, P.A.
Suite 500
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360 Wabasha Street
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Dear Mr. Thomas,

I recently read that the Supreme Court has granted certiorari to *Reiter v. Sonotone Corporation.* This case is of particular interest to us at the Center because we have just completed an empirical analysis of the deterrent effect of antitrust enforcement. We find that such enforcement deters price fixing behavior only when there is a credible threat of a private action. It is the class action, with its attendant large damages/settlements, that appears to deter price fixing. I think you will find the enclosed report on our research of considerable interest.

Sincerely,
MICHAEL K. BLOCK
Director, Center for
Econometic Studies
of the Justice System

MKB/kw
enc

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement: A Theoretical and Empirical Analysis*, Hoover Institute Technical Report ISDDE-1-78 (December 1978 Draft) 48

Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of L. & Econ. 7 (1966) 17

Donovan & Irvine, *Proof of Damages under the Antitrust Law*, 88 U.Pa. L.Rev. 511 (1940) 40

Forkosch, *Antitrust and the Consumer (Enforcement)* (1956) 12, 14, 19, 39

Hamilton & Till, *Antitrust in Action* (TNEC Monograph 16, 1940) 14, 19, 25

Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L.J. 626 (1976) 44

H.R. Rep. No. 627, Pt. 1, 63rd Cong., 2d Sess. (1914) 22

Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1978) 12, 22

Letwin, *Congress and the Sherman Antitrust Law: 1887-90*, 23 U.Chi. L.Rev. 221 (1955) 15

The New York Times, April 8, 1890, at 4. Col. 4 15

Newman, *Limiting the Antitrust Damage Suit: The Emergence of a Policy Against Complex Litigation*, 23 New York L.Sch. L.Rev. 253 (1977) 28

Note, *Illinois Brick: The Death Knell of Ultimate Consumer Antitrust Suits*, 52 St. John's L.Rev. 421 (1978) 26

Note, *Standing to Sue Under Section 4 of the Clayton Act*, 35 Ohio St. L.J. 723 (1974) 36

Oxford English Dictionary, Oxford Univ. Press, N.Y., Vol. VIII, 1961 11

Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L.Rev. 679 (1977) 26, 49

S.3445, 50th Cong. 1st Sess. (1888) 12, 13

S.1, 51st Cong., 1st Sess. (1889) 13

S.Rep. No. 698, 63rd Cong., 2d Sess. (1914) 22

S.Rep. No. 803, 94th Cong., 2d Sess. (1976) 49

Thorelli, *The Federal Antitrust Policy* (1954) 12, 14, 19

Timberlake, *Federal Damage Antitrust Actions* (1965) 25

Timberlake, *The Legal Injury Requirements and Proof of Damages on Treble Damage Actions Under the Antitrust Laws*, 30 Geo. Wash. L.Rev. 231 (1961) 36

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota (Pet. App. A-2) is reported at 435 F.Supp. 933. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A-12) is reported at 579 F.2d 1077.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 19, 1978. A timely petition for rehearing *en banc* was denied on August 11, 1978. On August 28, 1978, the Eighth Circuit entered an order staying issuance of its mandate for 60 days, and the petition for certiorari was filed within that time. This Court granted the petition for certiorari on January 8, 1979. Jurisdiction is founded upon 28 U.S.C. §1254(1) (1976).

QUESTION PRESENTED

Whether a consumer who purchased a hearing aid at retail for personal use, asserting no injury to a commercial interest or enterprise, satisfies the threshold standing test of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), which requires injury to "business or property."

STATUTE INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

STATEMENT OF THE CASE

On May 2, 1975, petitioner Kathleen R. Reiter commenced this purported class action for treble damages against respondents, five hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. §15 (1976).[1] Reiter seeks to represent a nationwide class of persons who, like herself, purchased hearing aids for personal use, not directly from the manufacturers, but from independent retail dealers.

In her complaint, Reiter alleges that the respondent-manufacturers violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14 (1976). Reiter claims that the manufacturers restricted the territories and customers of their retail dealers, required those dealers to deal exclusively in their respective hearing aids, used their dealers' customer lists for their own purposes, prohibited non-authorized dealers from dealing in or repairing their hearing aids, and fixed the retail prices of the dealers.[2] The manufacturers filed answers denying each of Reiter's material allegations.

The manufacturers moved for judgment on the pleadings or for summary judgment in the district court. Among other things, they urged that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for damages

---

[1] This brief is filed on behalf of four of the five manufacturers named in the complaint. Sonotone Corporation, which ceased doing business on August 25, 1978, is not included on the brief.

[2] As is clear from a reading of the complaint, this is far more than a simple price-fixing case. Reiter's allegations mirror those made by the FTC in proceedings filed some two years before this action. In the only matter adjudicated on the merits, the Administrative Law Judge found that Beltone Electronics Corporation, a respondent herein, did not engage in price-fixing. In re Beltone Electronics Corp., FTC Docket No. 8928, Initial Decision, Sept. 2, 1976, at 88.

under Section 4 of the Clayton Act because she was not injured in her "business or property" within the meaning of the Act. The district court denied the manufacturers' motions but certified the standing issue for interlocutory review under 28 U.S.C. §1292(b) (1976). The court has taken no other action on the merits of the case or questions of class certification.

The Eighth Circuit authorized the interlocutory appeal and reversed the district court, holding that retail purchasers like Reiter are not injured in their "business or property" for purposes of Section 4.[3] The Court of Appeals found that the legislative history of Section 4 of the Clayton Act evidenced a congressional intent to accord the treble damage remedy to the small businessman, not the ordinary consumer. Moreover, in

[3] Neither the Eighth Circuit below nor the district court has yet addressed the respondents' assertion that petitioner's action is clearly barred by this Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Reiter was not a direct purchaser from the manufacturer-level entities which she charges with a variety of vertical antitrust violations. Instead, she purchased at the intervening dealer level.

Although the *Illinois Brick* holding and underlying rationale apply directly and forcefully to bar this case, the *Amicus* Brief for the United States cryptically volunteers a contrary view. Brief for the United States at 4, n.4 and 24. In this regard, the government's position seems to be based on the inaccurate notion that this action should be viewed essentially as a simple vertical price-fixing case. At p.24, for example, the government's brief refers to a ". . . retail price maintenance scheme." As respondents have explained, Reiter has alleged a broad panoply of vertical claims; accordingly, if this case were to continue, the dominant analytical theme applicable to Reiter's allegations at the dealer level would depend upon the "rule of reason" economic framework established by this Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). This is a far cry from vertical price-fixing analysis.

This Court's decision in *Illinois Brick* was based to a significant extent on the difficulty and uncertainty involved in attempting to identify, measure, and allocate damages from alleged antitrust violations in the multi-level distribution context. In the present litigation, these problems are all present, compounded and made even more complex by the demanding economic quesions inherent in Reiter's vertical claims. Although the Eighth Circuit expressly declined to deal with the issue, *Illinois Brick* would certainly bar Reiter's indirect purchaser suit.

recognizing that Section 4 requires commercial or competitive injury, the Eighth Circuit followed the lead of this Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and other courts which have concluded that the words "business or property" refer to commercial interests or enterprises.

SUMMARY OF ARGUMENT

This case involves solely a question of statutory interpretation: What was the intent of Congress in 1890 when—having rejected a proposal to extend the newly-created remedy of a private antitrust damage action to "any person injured or damnified" by an antitrust violation—it specifically limited the remedy to "any person . . . injured in his business or property"? The Eighth Circuit held that, by virtue of the "business or property" limitation, Congress did not intend to extend the treble damage remedy to individual members of the general public who purchase goods for personal consumption unrelated to their commercial interests or enterprises. That decision rests upon a substantial body of authority and should be affirmed.

Both the language and legislative history of Section 4 of the Clayton Act, 15 U.S.C. §15 (1976), indicate that the extraordinary treble damage remedy extends not to the ordinary consumer for personal use but only to those who are injured in competitive interests or enterprises. The opinion of the court below is but the latest in a long line of cases decided by this and other courts which have definitively interpreted the phrase "business or property" as being limited to interests in commercial ventures or enterprises.

Section 4 confers standing to sue for treble damages not upon "any person" but only upon those persons injured in

their "business or property". This statutory language certainly excludes *some* category of injury. If it does not, then the phrase "business or property" is mere surplusage.

Reiter and the *Amici* blithely ignore the linguistic dichotomy between the standing provisions of Section 4 and those of Section 16, 15 U.S.C. §26 (1976), the private injunctive provision of the Clayton Act. They give Section 4, with its restrictive "business or property" language, the same broad sweep as Section 16, which confers standing upon "any person" threatened with injury.

The assertion of Reiter and the *Amici* that "business or property" encompasses all pecuniary interests, i.e., that "property" means simply "money", also does violence to the statutory language. Their interpretation would render the term "business" superfluous. On the other hand, a "commercial interests" reading of the statute preserves the significance of each of the terms "business" and "property" because one may possess commercial property unconnected with his business or primary livelihood.

The legislative history of Section 4 fully supports the limitation to commercial ventures or enterprises dictated by the very language of the statute. Senator Sherman initially introduced in 1888 a bill which would have accorded relief to "any person . . . injured or damnified." *But his bill did not become the law.* The Judiciary Committee struck his broad language from the bill ultimately enacted in favor of the more limited "business or property" requirement. This was consistent with the constitutional thinking of the day on the States' power to control internal commerce and Congress' power to regulate interstate commerce under the Commerce Clause. Moreover, when in 1914 Congress incorporated Section 7 of the Sherman Act as Section 4 of the Clayton Act, it clearly

recognized that "its great purpose is to protect small business from big business". 51 Cong. Rec. 9198 (1914) (remarks of Rep. Taggart).

Apart from the clear language and legislative history of Section 4, the opinion of the court below is grounded upon this Court's conclusion in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), where this Court declared:

> "Like the lower courts that have considered the meaning of the words 'business or property', we conclude that they refer to commercial interests or enterprises." *Id.* at 264.

Numerous other federal courts, in considering the "business or property" limitation, both before and after this Court's decision in *Hawaii*, have reached the same conclusion.

This settled interpretation is premised on the basic purpose of the antitrust laws to foster and promote competition. Free and open competition indirectly benefits all segments of the economy, noncommercial as well as commercial. However, the extraordinary treble damage remedy was aimed at achieving this result by invoking the aid of those enterpreneurs whose commercial interests would be most directly affected by anti-competitive behavior — those persons injured in their "business or property". Not surprisingly, the vast majority of treble damage actions since 1890 have been initiated by plaintiffs engaged in some commercial venture or enterprise and, insofar as we are aware, for at least the first 50 years under the antitrust laws, no noncommercial consumer initiated a treble damage action.

Congress, in limiting the treble damage remedy to those injured in competitive or commercial interests, and the courts, in implementing the statute, recognized that indiscriminate expansion of the treble damage remedy could create awesome

administrative burdens which undermine effective enforcement of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). To expand now the scope of Section 4 to noncommercial purchasers would add substantial burdens to the administration of justice outweighing whatever relatively small benefits, if any, the noncommercial consuming public might receive beyond those now accruing from government enforcement actions and treble damage suits undertaken by the business community.

Existing antitrust remedies are wholly adequate to deter and penalize antitrust violators and to protect consumers at large. Civil and criminal antitrust actions by the federal and state governments, consumer actions for injunctive relief under Section 16 of the Clayton Act, and *parens patriae* and other suits by state attorneys general all comprise a potent arsenal of enforcement weapons. This well-considered enforcement scheme, and the settled limitation of Section 4 which restricts treble damage actions to persons engaged in commercial pursuits, should not now be upset. To the extent that Section 4 might ever warrant expansion, the job is for Congress, not this Court.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4 OF THE CLAYTON ACT ESTABLISH THAT ONLY PERSONS INJURED IN COMMERCIAL INTERESTS OR ENTERPRISES HAVE STANDING TO SUE.

A. The Statutory Language Itself Limits the Category of Persons Entitled to Sue.

The plain language of Section 4 of the Clayton Act, which limits a cause of action for treble damages to "any person who shall be injured in his business or property", contains the initial key to understanding the narrow remedy provided.[4] Section 4 affords standing not to "any person" but only to those who demonstrate injury to their "business or property". Obviously, by its choice of words, Congress sought to exclude *some* category of injury. If the "business or property" limitation does not exclude simple, monetary injury to individuals like Reiter, then, in effect, "any person" has standing to sue, and the "business or property" requirement becomes meaningless.

Examination of the language in Section 16 of the Clayton Act, which provides broad injunctive relief for violations of the antitrust laws, confirms the narrow scope of Section 4. Section 16 provides that a private civil action for an injunction may be maintained by "[a]ny person, firm, corporation, or association . . . against threatened loss or damage by a violation of the antitrust laws . . . ." 15 U.S.C. §26 (1976). The

[4] "The starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

marked contrast between the "any person" language of Section 16 and the "business or property" limitation in Section 4 manifests the deliberate choice on the part of Congress to restrict the radical treble damage remedy to a more select group of persons. As this Court itself recognized in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-62 (1972), this difference reflects that the injunctive remedy was considered less drastic and less likely to impose substantial burdens than the treble damage remedy.[5] Nevertheless, Reiter attempts in effect to give Section 4 the same broad sweep as Section 16.

Unlike Reiter's strained construction, a "commercial interest" interpretation of the "business or property" limitation in Section 4 preserves the significance of each of the statutory terms "business" and "property". One clearly sustains injury to "business" when a violation of the antitrust laws harms a commercial enterprise.[6] However, one sustains an injury to "property" if the violation harms a commercial pursuit or interest unconnected with one's business or primary livelihood. This distinction is illustrated by *Waldron v. British Petroleum*, 231 F.Supp. 72 (S.D.N.Y. 1964). In *Waldron*, the plaintiff who had procured a contract for the importation and sale of Iranian oil commenced an action for damages under the

[5] The courts have confirmed this analysis of Section 4. For example, in Tugboat Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174-75 (5th Cir. 1976), the court noted the striking differences between Section 16 and Section 4, concluding that, although the general rules of standing apply to actions for injunctive relief, treble damage actions may be brought only in the case of injury to "commercial interests or enterprises". *See also* In re Multi-District Vehicle Air Pollution, M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

[6] *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, (1969) (television manufacture); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967) (loss of employment). *See generally* Blackford, *"Business or Property" Entitled To Protection Under Section 4 of the Clayton Act*, 26 Mercer L.Rev. 737 (1975).

Clayton Act alleging that the defendants conspired to suppress and eliminate competition in Middle Eastern petroleum. The court held that plaintiff's contract constituted "property" under Section 4 of the Clayton Act, even though the evidence conclusively demonstrated that he was not then engaged in the oil "business". *Id.* at 86.

On the other hand, if, as Reiter and the *Amici* suggest, "property" means "money",[7] then the statutory term "business" becomes superfluous, in violation of elementary canons of statutory construction.[8] Equating "property" with "money" renders the term "business" unnecessary because every economic injury to business is a monetary injury. If Congress had intended to provide a treble damage remedy to everyone who had suffered a monetary injury, it could have simply provided standing to "any injured person". Only a "commercial

[7] An examination of the word "property" in the historical context in which it was used by the Congress of 1890 illustrates that it was generally understood to refer to land, wealth and large amounts of money, such as would typically be involved in commerce. The philological development of "property" demonstrates that in 1890, at the end of the Victorian Era, common usage would never have employed the word "property" in connection with a toothbrush, or shoe, or hearing aid, or a $10 bill. *See* Oxford English Dictionary, Oxford Univ. Press, N.Y., Vol. VIII 1961. This reinforces the view that the language of Section 4, when measured against the common usage of language at the critical time, requires a conclusion that "business or property" be construed as "business activity or property related to one's business". To construe this phrase as "money" or as anything of purely personal or nominal value would be to apply a connotation which would have been totally foreign to the congressmen of 1890.

[8] A statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 99 S.Ct. 675 (1979). Each of the statutory words should be given its "separate meaning". FCC v. Pacifica Foundation, 98 S.Ct. 3026 (1978).

interest" interpretation gives vitality to each of the statutory terms "business" and "property".[9]

B. The Background of the Sherman Act Supports the Limitation on Standing to Sue for Treble Damages.

The predecessor to the treble damage provision in Section 4 of the Clayton Act was Section 7 of the Sherman Act, 26 Stat. 210 (1890).[10] Its evolution began with a bill introduced by Senator Sherman in 1888, S. 3445, 50th Cong. 1st Sess. (1888), which provided in pertinent part that:

> "[A]ll arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the *cost to the consumer* . . . are hereby declared to be against public policy, unlawful, and void; and *any person or corporation injured or damnified* by such arrangement, contract, agreement, trust or corporation (sic) may sue for and recover in any court of the United States . . .

[9] "[T]he terms 'business or property' . . . do not encompass all pecuniary injury. . . ." Hawaii v. Standard Oil Co., 431 F.2d 1282, 1285 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). *See also* Hamman v. United States, 267 F.Supp. 420, 432 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968) (every "property" interest protected by state law not within the scope of Section 4); Broadcasters Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641, 644 (D.N.J. 1960) (the terms "business or property" are used in the ordinary sense and denote a commercial venture or enterprise); Gerli v. Silk Ass'n of America, 36 F.2d 959, 960-61 (S.D. N.Y. 1929) (loss of personal income resulting from an antitrust violation does not constitute injury to "business or property").

[10] *See* 19 Cong. Rec. 7513 (1888). *See generally* Forkosch, *Antitrust and the Consumer(Enforcement)* 32-168 (1956); 1 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 8-30 (1978); Thorelli, *The Federal Antitrust Policy* 164-232 (1954).

As discussed below, Section 4 of the Clayton Act, Act of October 15, 1914, Ch. 323, §4, §8 Stat. 731, essentially reenacted Section 7 of the Sherman Act, Act of July 2, 1890, Ch. 647, §7, 26 Stat. 210. Both sections were codified at 15 U.S.C. §15. Congress repealed the duplicative Section 7 in 1955. Act of July 7, 1955, Ch. 283, §3, 69 Stat. 283.

> double the amount of damages suffered. . . ." (emphasis added)

Congress never acted upon S. 3445, and during the next session Senator Sherman introduced S. 1, 51st Cong. 1st Sess. (1889), which was virtually identical to S. 3445 and which again provided a remedy for any person "injured or damnified." *See* 21 Cong. Rec. 96 (1889). Congress referred S. 1 to the Senate Finance Committee, of which Senator Sherman was the ranking member. Although the Committee amended S. 1, the bill retained Sherman's reference to "the cost to the consumer" and the damage provision for "any person . . . injured or damnified". *See* 21 Cong. Rec. 1765 (1890).

On February 27, 1890, when the bill as amended was reported back to the Senate, Senator George from Mississippi launched a major attack upon it. One of his primary concerns was that the consumer alone would benefit from the bill. According to Senator George, the bill "leaves unpunished and perfectly lawful" those combinations which use price reductions to force competitors out of business. *Id.* at 1767. Further, in George's opinion Sherman's bill did not provide a realistic remedy to consumers. He argued that few, if any, consumer suits would ever be instituted and that not one would ever be successful. *Id.* at 1768. Senator George also believed that the bill contravened the Commerce Clause of the Constitution to the extent that it was directed at all combinations and agreements, including those which were purely intrastate. *Id.* at 1768-69.

Subsequently, Senator Sherman introduced a substitute bill which was probably intended to meet Senator George's constitutional objections, but which retained the number S. 1 as well as the reference to the "cost to the consumer" and the damage

provision for "any person . . . injured or damnified." 21 Cong. Rec. at 2455; Thorelli, *The Federal Antitrust Policy* 179 (1954). However, certain senators continued to argue against both the constitutionality of the bill and the ineffectiveness of its remedy. *See, e.g.*, 21 Cong. Rec. at 2571-72 (remarks of Sen. Hiscock and Sen. Teller).

On March 27, 1890, after several days of debate, the Senate referred S. 1 to the Committee on the Judiciary which was "notoriously hostile to the legislation [and which] turned a deaf ear to all the Senate had said and done and went its own way." Hamilton & Till, *Antitrust in Action* 11 (TNEC Monograph 16, 1940). On April 2, 1890, when the Committee reported out the bill in substantially the form in which it was ultimately enacted, the Committee had not only eliminated all references to arrangements tending "to advance the cost to the consumer" but also had limited recovery to "[a]ny person . . . injured in his business or property." This qualifying and narrowing language was later incorporated into the private damage provision which became Section 7. *See* 21 Cong. Rec. 2901 (1890).[11]

Supporters of a broad damage remedy were disappointed with the narrowness of Section 7. Senator Vest, for example, was dissatisfied because Section 7 "does not go far enough", and Senator Coke preferred Section 7 "to be in a little different form." *Id.* Senator Sherman also was clearly displeased with the Judiciary Committee version and denounced it as "totally ineffective in dealing with combinations and trusts."

[11] Authorship of Section 7 has been attributed to Senator Hoar whose sympathies, in the opinion of one author, probably were with the large trusts. *See* Forkosch, *supra*. n.10, 162-63, 169-170 (1956). In the course of debate on Sherman's bill, Senator Hoar himself cautioned against "hold[ing] out to the people false remedies or pretended cures." 21 Cong. Rec. 2568 (1890).

Letwin, *Congress and the Sherman Antitrust Law: 1887-90* 23 U. Chi. L.Rev. 221, 255 (1955), *quoting The New York Times*, April 8, 1890, at 4. Col. 4. Senator George, however, stated:

> "I regard the bill, so far as it goes, as a very good one, the best I think that can be framed under that particular power of Congress, the power over commerce, which the committee have attempted to frame a bill under." 21 Cong. Rec. 2901 (1890).

On April 8, 1890, the Senate proceeded to consider the new bill as proposed by the Judiciary Committee. Although dissatisfied with the scope of Section 7, Senator Sherman and other pro-consumer legislators apparently accepted it as the best compromise available at the time. Thus, Senator Sherman commented:

> "I shall vote for it, not as being precisely what I want, but as the best under all the circumstances that the Senate is prepared to give in this direction." 21 Cong. Rec. 3145 (1890).

Senator Vest too gave up opposition to Section 7 "in order to facilitate [the bill's] immediate passage." *Id.*

Attempts to amend Section 7 so as to resurrect a broader private right of action were unsuccessful. Senator Reagan offered an amendment to Section 7 designed to give the state courts concurrent jurisdiction over private actions. Similarly, Senator George proposed an amendment which would have allowed private plaintiffs who had been injured to unite in

a "quasi-class action".[12] *Id.* at 3145-48. Senators Hoar and Edmunds opposed the two amendments, emphasizing that the Judiciary Committee previously had rejected them, and cautioned against "a more sweeping and vigorous remedy" since Congress was "entering upon a new and untrodden field of legislation." *Id.* at 3146 (remarks of Sen. Hoar); *Id.* at 3148 (remarks of Sen. Edmunds).

As the Eighth Circuit observed below, the deliberate change in critical legislative lan_uage from Sherman's bill to Section 7 as finally enacted cannot be ignored. While the original bill arguably was meant to give a noncommercial consumer like Reiter standing to sue for damages, that bill was rejected. This action evidenced a recognition on the part of Congress that the *remedy* of damage suits by individuals injured solely in their capacity as retail purchasers for their own consumption was not workable or desirable. However, Section 7 in no way diminished the basic *object* of protecting the consumer by preserving competition. The private damage remedy was afforded only to those persons most likely to be affected significantly —those entrepreneurs injured in their "business or property" —so as to secure judicial relief and insure the integrity of the competitive process for all.

Accordingly, the respondent-manufacturers' analysis of the legislative history is wholly consistent with Professor Bork's

[12] Even Senator George's proposal was aimed at strengthening the remedy of the businessman, not the noncommercial consumer. George regarded the "crush[ing]" of "the small men engaged in competition" as "the great evil at which all this legislation ought to be directed". The purpose of his proposed amendment was to permit "these small farmers, these mechanics . . .[who] have been compelled to pay [great prices] for articles they must use to unite in the same suit." 21 Cong. Rec. 3147-48 (1890).

During the course of his argument, Senator George occasionally referred to the small farmers who purchased cotton bagging as "consumers". This type of consumer is readily distinguishable from the retail consumer like Reiter.

thesis (upon which Reiter relies at p. 13 of her brief) that "maximization of consumer welfare" was the underlying theme of the Sherman Act. *See* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of L. & Econ. 7 (1966).[13] As Bork observed, even among those Senators on the Judiciary Committee who believed in the promotion of consumer welfare, there was marked division on the *remedy* to be implemented. Indeed, some substitute bills contained no private relief provisions at all, while others, like Senator Sherman's, opted for a broad, private right of action.[14] In limiting recovery to those persons injured in their "business or property" the Judiciary Committee obviously embarked upon a middle road, implementing a limited treble damage remedy as the best means to protect competition and maximize consumer welfare.

The respondent-manufacturers' analysis of the legislative history is also consistent with this Court's footnote *dictum* in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), upon which Reiter and the *Amici* rely. That case involved an action by certain bowling alley operators for dam-

[13] Bork's article addresses what constitutes a violation of the Sherman Act rather than issues of standing or the meaning of "business or property".

[14] Professor Bork notes:

"Those who spoke overwhelmingly agreed with [Senator Sherman's] position on this issue [the goals of antitrust]. Disagreement was largely confined to questions of remedies and the constitutional reach of Sherman's measure. The reference to the Judiciary Committee was finally made, after having been voted down twice, because of concern with those matters. . . ." 9 J. of L. & Econ. at 45.

See 21 Cong. Rec. 2613 (1890) (bill by Senator Ingalls); 21 Cong. Rec. 2613-14 (1890) (bill by Senator Coke, which was supported by Senator Vest as "far more effective" than Sherman's bill, 21 Cong. Rec. 2570-71 (1890)); 21 Cong. Rec. 2657 (1890) (bill by Senator Gray, identical to bill previously introduced by Senator George); 9 J. of L. & Econ. at 19 n.27; *see id.* at 41 n.97 ("the difference between George's bill and Sherman's . . . lay in the remedies provided").

ages allegedly resulting from Brunswick's acquisition of competing alleys. Like most of Reiter's principal authorities, *Brunswick* was not a suit by noncommercial consumers. Neither was there any issue as to "business or property" in the case. Rather, the Court addressed only the narrow issue whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares. *Id.* at 484.

The Court held antitrust damages were unavailable under the circumstances presented. The footnote in question was written to support the idea that the treble damage provision was designed primarily as a remedy.[15] Nowhere does the footnote, much less the body of the Court's decision, mention the question of noncommercial consumer standing to sue, and nothing in the text of the footnote sheds any light on the meaning of "business or property".[16] Indeed, the quotation from Senator George's remarks that the damage section was a remedy for "the people of the United States as individuals", to which Justice Marshall added the phrase "especially consumers", related to the original Sherman bill, not to Section 7 as actually adopted.

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[15] The portion of footnote 10 relied on by Reiter and the *Amici* reads as follows:

"Treble damage antitrust actions were first authorized by §7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers. . . ." 429 U.S. at 486.

[16] Throughout their arguments, Reiter and the *Amici* repeatedly fail to recognize that the term "consumer" by itself does not denote personal as opposed to commercial use. A consumer is one who utilizes economic goods. *Brunswick* does not support Reiter's position since it only refers to "consumers". It does not suggest that a consumer has the requisite standing if he or she is not injured in a commercial interest.

The thrust of Section 7 is clear. Congress created a right of action only for those persons involved in commercial activities. Because of their great stake, the entrepreneurs would be the ones needed to police the antitrust laws. *See* Hamilton & Till, *Antitrust in Action*, *supra*, at 82. Thus, Congress adopted a middle-of-the-road approach, rejecting both the broad right of action originally proposed by Sherman and the alternative of no private remedy at all. Congress apparently concluded that competition would be best preserved by the businessman's suit, from which the consumer for personal use would benefit indirectly. *See*, Thorelli, *The Federal Antitrust Policy*, *supra*, at 227.[17] The course of practice under the Sherman Act did not break with its history. Not one noncommercial consumer action was brought under the Sherman Act for at least 50 years.[18]

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[17] Thorelli observes:

"There can be no doubt that the Congress felt that the ultimate beneficiary in this whole process was the consumer, enjoying a continuous increase in production and commodity quality at progressively lowered prices. The immediate beneficiary legislators had in mind, however, was in all probability the small business proprietor or tradesman whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business that seemed so strange, gigantic, ruthless and awe-inspiring." *The Federal Antitrust Policy*, *supra* at 227.

[18] Forkosch, *supra* n.10, at 290.

C. The Deliberate Choice of the Restrictive "Business or Property" Language was Consistent with Congress' Understanding of its Limited Constitutional Power to Regulate Commerce in 1890.

Unless the 52d Congress deliberately chose to violate the Constitution, its selection of the words "business or property" in Section 7 of the Sherman Act could not have accorded the retail consumer standing to recover treble damages. Presumably, Congress intended a constitutional enactment. Congress cannot be attributed with "an intent to defy the [Constitution], or even to come so near to doing so as to raise a serious question of constitutional law". *FTC v. American Tobacco Co.*, 264 U.S. 298, 307 (1924).

An expansive reading of Section 7 is plainly inconsistent with Congress' understanding in 1890 of its limited power to regulate intrastate commerce. Congress passed the Sherman Act under the authority of the Commerce Clause of the Constitution. In 1890 retail trade was highly localized. Transportation was limited and local stores made retail sales to local customers. Congress did not then believe it had the power to regulate such intrastate trade and commerce.

Reflective of the limited scope of the Commerce Clause at that time were the *License Tax Cases*, 5 Wall. 462, 470-471 (1867), in which this Court said:

> "Over this commerce and trade [the internal commerce and domestic trade of the States] Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."

Yet another case indicating that retail trade was not considered to be interstate commerce at the time Congress enacted the Sherman Act is *Kidd v. Pearson*, 128 U.S. 1 (1888). In holding that a manufacturer of intoxicating liquors could be regulated by the State of Iowa even when the manufacturer intended to export his product to other states, this Court stated:

> "Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in *forbidding the retail within her borders of the same articles after they have left the hands of the importers?* That the latter could be done was decided years ago; and we think there is no practical difference in principal between the two cases." *Id.* at 23 (emphasis added)

This Court decided *Kidd* just two years before the limiting words "business or property" were included in Section 7 of the Sherman Act. Since retail trade was then considered within the States' power to regulate and not within the power of Congress under the Commerce Clause, a logical explanation for the addition of the words "business or property" is that they were intended to eliminate claims for damages by the retail purchaser and thus to cure the constitutional infirmities of Senator Sherman's original bill. To assume otherwise would attribute to Congress an intention which would have raised serious questions of constitutional law.

Senator George, in the course of his attack upon the constitutionality of Sherman's bill, cited among other cases that of *Kidd v. Pearson*. 21 Cong. Rec. 1767 (1890). As a member of the Judiciary Committee that inserted the words "business or property" in Section 7, Senator George thought the bill was a

good one, ". . . the best I think that can be framed under that particular power of Congress, the power over Commerce. . . . " *Id.* at 2901. Thus, George obviously felt that Section 7 was no longer constitutionally objectionable. Similarly, in explaining the new bill Senator Hoar said:

> "We have affirmed the old doctrine of the common law in respect to all interstate and international commercial transactions. . . ." Id. at 3146.

One must assume that Congress intended a constitutional statute. Therefore, the phrase "business or property" was unlikely to have been intended to give a treble damage remedy to the retail purchaser then thought beyond the ambit of the Commerce Clause.[19]

D. The Background of The Clayton Act Further Demonstrates that Congress Did Not Accord the Treble Damage Remedy to Retail Consumers.

When Congress enacted the Clayton Act in 1914, it incorporated Section 7 of the Sherman Act, with minor modifications, as Section 4 of the Clayton Act.[20] Although the Clayton Act added a new private injunctive remedy for persons threatened with loss or damage from antitrust violations, 15 U.S.C. §26 (1976), Congress did not similarly expand the category of person or kind of injury covered by the treble damage remedy. The legislative history of Section 4 of the Clayton Act confirms that, like its predecessor in the Sherman Act, it was intended to apply only to injury to commercial interests or enterprises.

[19] Admittedly, if Congress had not enacted Section 7 with the phrase "business or property" included, the courts might have denied the retail purchaser standing to sue as a matter of constitutional law. In that event, courts would subsequently have been free to eliminate the restriction as constitutional interpretation changed. Here, however, it is the intention of Congress in adding the phrase "business or property" in 1890 that is in question—not current constitutional thinking.

[20] Congress did not intend Section 4 to expand Section 7 substantively. *See* H.R. Rep. No. 627, Pt. 1, 63d Cong., 2d Sess., at 14 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., at 44 (1914). *See generally* 2 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 989-1025 (1978).

During the House debate, Representative Webb, a member of the Judiciary Committee, undertook "to give a running outline of the meaning and meat of each provision in this bill . . . a simple, straightforward, nontechnical statement as to . . . what the bill is and what it means." 51 Cong. Rec. 9069 (1914). He described the provisions of the present Section 4 (at that time numbered Section 5) as giving "any person who may be injured in his *business*, by reason of anything forbidden in the antitrust laws, the right to . . . recover three-fold the damages sustained, together with the cost of the suit, including a reasonable attorney's fee." *Id.* at 9073 (emphasis added). Later Representative Webb again described Section 4 as authorizing suits by a "*business man* somewhere in the United States or 40 or 50 of them. . . ." *Id.* at 16274 (emphasis added).

Other congressmen explained the meaning and scope of the treble damage remedy in terms which underscored the congressional intent to accord only the businessman a right of action. Representative Carlin, for example, commented on the provision that allows judgments in government actions to be relied upon in Section 4 actions as follows:

> "We went further in our effort to help the individual. We said, '*When you have been damaged in your business* by a combination operating in restraint of trade we are going to put you no longer to the expense of gathering the testimony and of combating the wealth of the world in order to recover your damages' ". 51 Cong. Rec. 9270 (1914) (emphasis added).

Likewise, Representative Taggart, also a member of the House Judiciary Committee through which the bill passed, emphasized that Section 4 was aimed at commercial injury:

> "A great many suits have been brought against trusts by the United States and many trusts have been dissolved. Some few have been punished, but the people whose *business* they destroyed have been practically without a remedy. When this bill becomes a law, the person who willfully destroys another person's *business* will do so at his peril.
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> * * *
>
> "The bill is framed for the purpose of liberating business and not for the purpose of injuring or destroying any business. *Its great purpose is to protect small business from big business,* and to compel all business to be conducted honestly." 51 Cong. Rec. 9198 (1914) (emphasis added).

Similarly, Senator Reed described the impact of the treble damage remedy in these terms:

> "It follows that the Argus eyes of thousands of *business men* now being injured will be upon the powerful concerns, and the thousand arms of the courts will be employed to prevent their evil practices." 51 Cong. Rec. 12939 (1914) (emphasis added).

A similar interpretation was echoed by Representative Floyd, who referred to the provisions in the Act concerning private antitrust enforcement as follows:

> "We have taken, by these provisions, the *business public* into our confidence as allies of the Government in enforcing the antitrust laws, and given to the *business men* of the country who are being imposed upon by unlawful combinations remedies by which they can recover their own damages without waiting upon the slow and tortuous course of prosecution on the part of the Government." 51 Cong. Rec. 16319 (1914) (emphasis added).[21]

The legislative history of the antitrust laws unmistakably illustrates that, in originally providing the treble damage remedy to persons injured in their "business or property" in Sherman Act Section 7, and in incorporating that provision into Clayton Act Section 4, Congress understood that this extraordinary remedy was not extended to noncommercial consumers among the general public. Accordingly, for this Court now to include retail purchasers like Reiter within the ambit of the deliberately narrow "business or property" limitation would do violence to the history of this unique relief provision.

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[21] For the same understanding of the scope of Section 4 *see generally* the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws; Hamilton & Till, *Antitrust In Action* 83-85 (TNEC Monograph 16, 1940); Timberlake, *Federal Damage Antitrust Actions* 20 (1965).

II. THIS COURT AND MANY FEDERAL APPELLATE COURTS, LIKE THE COURT BELOW, HAVE REPEATEDLY INTERPRETED THE PHRASE "BUSINESS OR PROPERTY" TO REQUIRE INJURY TO A COMMERCIAL INTEREST OR ENTERPRISE.

A. The Courts Generally Have Limited Standing Under Section 4.

Congress enacted the antitrust laws to preserve and promote competition—to protect the competitive process itself. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958). The primary concern of the antitrust laws is not the enrichment of private citizens or their attorneys, but rather the maintenance of an open economy for the benefit of all. The private right to maintain an action for treble damages is "purely incidental and subordinate to this primary purpose of protecting the public". *Hamman v. United States*, 267 F.Supp. 420, 431 (D.Mont. 1967), quoting *Nelligan v. Ford Motor Co.*, 161 F.Supp. 738, 741 (W.D.S. Car. 1958), *aff'd*, 262 F.2d 556 (4th Cir. 1959).

Because the private action for treble damages is an extraordinary and powerful statutory remedy, the courts have construed Section 4 narrowly.[22] This Court itself has recognized the narrow scope of this Section in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), noting that:

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 262, n.14.

[22] *Accord*, Note, *Illinois Brick: The Death Knell of Ultimate Consumer Antitrust Suits*, 52 St. John's L.Rev. 421 (1978) and cases cited at n.2; Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L.Rev. 679, 702 (1977) ns. 132, 133, and 134 and accompanying text.

Recognition of the necessity for restraints upon the private right of action under Section 4 was pointedly expressed by the Second Circuit in *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). The court there stated that Congress did not give standing to "any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior." *Id.* at 171. As a result, "all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured." *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 295 (2d Cir. 1958).

The rationale underlying the proper construction of Section 4 was amplified by the Second Circuit, in language appropriate to this action, in *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972):

> "[I]f the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."

That not every injury traceable to an antitrust violation is cognizable under Section 4 of the Clayton Act was again underscored by this Court's recent decision in *Illinois Brick*

Co. v. Illinois, 431 U.S. 720 (1977). Based on an evaluation of competing policy considerations, this Court in *Illinois Brick* further limited the right to bring a treble damage action to those persons who purchase directly from the alleged violators and refused to permit indirect purchasers to demonstrate a "pass-on" of alleged price overcharges. Explicitly acknowledging that its decision would deny recovery to some who may have been injured by antitrust violations,[23] this Court recognized the practical limits upon the Section 4 private right of action:

> "Permitting the use of pass-on theories under § 4 essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness." *Id.* at 737.[24]

As illustrated by the foregoing cases, the limitation on Section 4 adopted by the Eighth Circuit below—that the phrase "business or property" means commercial interests or enterprises—is logically and firmly rooted in settled ideas of restricted standing. Moreover, as with the examination of legislative history of Section 4, scrutiny of those cases which have addressed, directly and indirectly, the meaning of "business

[23] *Id.* at 746.

[24] One commentator has suggested that, in addition to traditional antitrust considerations, the *Illinois Brick* decision was founded in part on the public interest in relieving the courts from the burden of protracted litigation which interfers with their availability for the dispensation of justice. Newman, *Limiting the Antitrust Damage Suit: The Emergence of a Policy Against Complex Litigation*, 23 New York L. Sch. L.Rev. 253, 269 (1977).

or property" definitively demonstrates that the treble damage remedy does not extend to consumers who have not sustained injury to commercial interests or enterprises.

B. This Court Has Definitively Construed "Business or Property" to Refer to Commercial Interests or Enterprises.

In determining that "business or property", means commercial interests or enterprises, the court below followed this Court's authoritative statement on the issue in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).[25] There this Court ruled that a state may not sue under Section 4 for general pecuniary injury to its citizens. The issue in *Hawaii* was whether the injury for which the State sought recovery was "an injury to its 'business or property.'" 405 U.S. at 261. To resolve this issue, the Court necessarily had to define "business or property", and it did so unequivocally:

> "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to *commercial interests or enterprises*." 405 U.S. at 264 (emphasis added).

The Court held that "[w]hen the State seeks damages for injuries to its *commercial interests*, it may sue under §4." *Id.* (emphasis added). It also noted that "[t]he section gives the same right to every citizen of Hawaii with respect to any damage to business or property." *Id.* at 262-63. Thus, like the State's remedy, the citizen's remedy is limited to injuries to commercial interests or enterprises. Even the dissenting opinion of Mr. Justice Douglas repeatedly described the potential

[25] Reiter v. Sonotone Corp., 579 F.2d at 1082-83 (Pet.App. 22, 23).

plaintiffs under Section 4 as "individual entrepreneurs." *Id.* at 269, 270.

Reiter does not attempt to distinguish meaningfully *Hawaii's* conclusion that "business or property" means "commercial interests or enterprises." However, the *Amici* States argue that a consumer for personal use participates in a commercial transaction by the act of making a purchase and, thus, satisfies the "commercial interest" requirement of *Hawaii.* Brief for the States, p. 14. This argument ignores the very language of Section 4 which focuses on the plaintiffs' own commercial interests not the nature of their transactions.

C. Numerous Other Courts Have Repeatedly Recognized That "Business or Property" Refers to Commercial Interests or Enterprises.

Until very recently the lower courts had consistently interpreted Section 4 as limited to persons injured in a commercial interest or enterprise.[26] While only a handful of courts have directly addressed the issue presented in this appeal, numerous courts have dealt squarely with the meaning of

[26] The opinions cited by petitioner as contrary to the decision below were, with one exception, issued prior to the Eighth Circuit's ruling and in reliance on the district court's opinion. *See* Theophil v. Sheller-Globe Corp., 446 F.Supp. 131 (E.D.N.Y. 1978), *appeal dismissed on other grounds*; In re Ampicillin Antitrust Litigation, 1977-1 Trade Cas. ¶61,434 (D.D.C. May 17, 1977); DeGregorio v. Segal, 443 F.Supp. 1257 (E.D.Pa. 1978); In re Petroleum Products Antitrust Litigation, 1977-2 Trade Cas. ¶61,639 (C.D.Cal. Sept. 16, 1977); Rosack v. Volvo of America Corp., 1977-1 Trade Cas. ¶61,395 (Cal. Super. Ct. March 16, 1977); Brief for Petitioner, p. 5, n.5. The only exception is Kaplan v. Rolex, an unpublished Minute Order entered by a Judge of the Los Angeles Superior Court less than two months after the Eighth Circuit's *Reiter* decision. (CA000467, August 11, 1978).

"business or property". Like this Court in *Hawaii,* they too have concluded that Section 4 requires injury to commercial interests or enterprises.

The Second Circuit, for example, has flatly rejected the attempt to use Section 4 as the basis for a claim of pecuniary injury to noncommercial property. In *Bookout v. Schine Chain Theatres, Inc.,* 253 F.2d 292 (2d Cir. 1958), the court affirmed a summary judgment dismissing a complaint for various injuries allegedly arising out of a conspiracy to drive a small theatre corporation out of business. The plaintiff was the successor to the controlling stockholder of the defunct corporation. Among other injuries, the plaintiff claimed that, as part of their conspiracy, the defendants agreed to stifle the bidding at an auction for the theatre's shares. Plaintiff sought treble damages for the difference between the true value of the shares and the price paid at the allegedly rigged auction.

The court recognized that this particular claim was "quite aside from any loss [to plaintiff] as a shareholder from the injury caused to the corporation." 253 F.2d at 294. Rather it was a claim for diminution of the value of the plaintiff's own personal property. In rejecting this claim, the court, in an opinion by Judge Learned Hand, held that "the Anti-Trust Acts do not cover such losses." *Id.* The court explained its rationale as follows:

> "The action at bar will not lie because all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured." 253 F.2d at 295.

Likewise, in *GAF Corp. v. Circle Floor Co., Inc.,* 463 F.2d 752 (2d Cir. 1972), *cert. dismissed* 413 U.S. 901 (1973), the

Second Circuit again made it clear that it is injury to competitive position in business which is crucial:

> "Not all persons who may be able to trace an economic loss to a violation of the antitrust laws can recover under those laws. . . ."
> "This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he is or was engaged. [citations omitted] . . . The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." 463 F.2d at 758-59 (emphasis in original).

The Tenth Circuit came to the same conclusion in *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). The *Reibert* plaintiff alleged that he had lost his job because of an anti-competitive merger. The court stated that, for him "to satisfy the business or property prerequisite, he must demonstrate that his job is a commercial venture or enterprise." 471 F.2d at 730.

Further, the Ninth Circuit in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.) *cert. denied*, 414 U.S. 1045 (1973), also reaffirmed that a private plaintiff must allege injury to a business-type venture in order to satisfy the "business or property" requirement of Section 4. In several different passages, the court made it clear that the phrases "commercial interests or enterprises" and "commercial ventures or enterprises" mean something more than a mere consumer purchase transaction in the marketplace. Referring to this Court's construction of "business or property"

in *Hawaii*, the court stated that "business or property" is "definitively limited to interests in commercial ventures or enterprises." 481 F.2d at 126. In summing up standing requirements under the "business or property" language of Section 4, the court continued:

> "To attain standing, a plaintiff must thus allege that the antitrust violation injured a *commercial enterprise* of the plaintiff in the area of the economy in which the elimination of competition occurred. *Id.* at 128 (emphasis added).

Applying this test of standing, the court held in *Air Pollution* that governmental-entity plaintiffs suing for financial losses resulting from diminution in value of, and expenditures in connection with, government property and interests had not alleged "any injury to commercial ventures or enterprises" and thus had no standing to sue under the "business or property" language of Section 4. *Id.* at 126. In contrast, the court held that crop-farmer entities, asserting damage to their crop yields as a result of the alleged conspiracy among automobile manufacturers to delay the development of air-pollution control devices, did satisfy this requirement "since a diminished crop yield, for example, would constitute injury to commercial interests." *Id.* The farmers, in other words, were engaged in the business of farming. However, the court ultimately found that their commercial activities were not within the target area against which the alleged violation was directed for purposes of the "by reason of" language of Section 4 and denied standing to them on that basis. *Id.* at 129.

In a similar vein is *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976). There the court held that a union and its members had standing under Section 4 to sue a tugboat

company for conspiracy to restrain trade by obtaining low labor costs for tugboat services. In analyzing Section 4, the court recognized that the statutory language establishes "a standing requirement more demanding than that required in other types of actions", and then, following *Hawaii* concluded that "[c]learly, *the injury must be to commercial interests or enterprises.* . . ." *Id.* at 1174-75 (emphasis added).

In an earlier case, *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975), the Fifth Circuit held that residential telephone subscribers lacked standing under Section 4 to maintain a suit based on overcharges in their home telephone rates resulting from alleged antitrust violations by the telephone company and two subsidiaries. Since the court found that plaintiffs were not within the "target area" of the alleged conspiracy, it expressly did not rule on the "business or property" issue. Significantly, however, the court expressed "serious doubts as to whether appellants have sufficiently asserted injury to their 'business or property' " and noted that plaintiffs' subscription to residential telephones would not fit within the category of commercial endeavor because residential telephones are used primarily for personal pleasure or private matters, rather than in earning a livelihood. *Id.* at 1130-31, n.2.[27]

Prior to the *Reiter* decision below the Eighth Circuit had rejected another attempt by noncommercial plaintiffs to bring an action under Section 4 in *Ragar v. J. T. Raney & Sons*, 521 F.2d 795 (8th Cir. 1975), *aff'g* 388 F.Supp. 1184 (E.D. Ark.). In that case, owners of real property sought treble damage relief from investment banking firms which allegedly conspired

[27] *See also* Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 938 (5th Cir. 1976) *cert. denied* 429 U.S. 1121 (1977) (plaintiff failed to show injury to its "business or property" defined as "commercial interests or enterprises").

to fix an unreasonably high interest rate on certain municipal bonds, thereby causing plaintiffs to pay for the interest overcharge through higher real estate taxes. The district court dismissed the complaints for lack of standing, and the court of appeals affirmed, expressly adopting the lower court's opinion. 521 F.2d at 796. The district court held that plaintiffs were barred *both* because they were not directly injured by the alleged violation and because they were not injured in their "business or property," stating that:

> "The Supreme Court of the United States has emphasized that in determining who may sue under the antitrust laws, the central inquiry is one of *competitive injury. Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49 (1969). [Emphasis in original.] Since the purpose of the antitrust laws is the 'prevention of restraints to free competition in business and commercial transactions,' Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940), *it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act.*" 388 F.Supp. at 1187 (emphasis added).

More recently, the Eighth Circuit reaffirmed the *Reiter* decision and again concluded that "business or property" means "commercial interests or enterprises." *Beckers v. Int'l Snowmobile Industry Ass'n*, 581 F.2d 1308 (8th Cir. 1978).[28]

[28] This same definition of "business or property" has been accepted in a long line of district court decisions. *See, e.g.*, Ware v. Trailer Mart, Inc., N.D. Ohio, No. C74-394 (Mem. Opinion and Order, May 31, 1978) (plaintiff failed "to allege any type of competitive injury due to the activities of the defendant."); Young v. Colonial Oil Co., 451 F.Supp. 360, 361 (M.D.Ga. 1978) (private treble damage action limited to "damages which harm a business enterprise."); Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F.Supp. 158, 167 (D.Del. 1976) (plaintiff "must establish that his

In addition to *Reiter*, the most carefully reasoned decisions on the issue of noncommercial consumer standing are a series of opinions from the district court for the Northern District of California. *Gutierrez v. E. & J. Gallo Winery Co.*, 425 F. Supp. 1221 (N.D. Cal. 1977), *appeal pending*, No. 77-1896; *Weinberg v. Federated Department Stores Inc.* 426 F.Supp. 880 (N.D. Cal. 1977), *appeal pending*, No. 77-1547; *Smith v. Toyota Motor Sales U.S.A., Inc.*, Civ. No. C-75-0727 S.W. (N.D. Cal. Jan. 11, 1977), *appeal pending*, No. 77-1849, *et al.* In each of these cases, the plaintiffs were noncommercial consumers who alleged that the various defendants had violated the antitrust laws. Although the factual circumstances are somewhat different in each case, the court applied the same reasoning in dismissing each complaint on the basis that the plaintiffs were without standing to sue under Section 4 since they could allege no injury to "business or property."[29]

In ruling on the various defendants' motions to dismiss for lack of standing, the court considered the legislative history of

injury is by its nature different from the general public's and is directly related to his ability to carry on his business"); Freeman v. Eastman-Whipstock, Inc., 390 F.Supp. 685, 688 (S.D. Tex. 1975) (standing accorded only to those with "distinct commercial interests or enterprises"); Bowen v. Wohl Shoe Co., 389 F.Supp. 572, 578 (S.D. Tex. 1975) (the term "refers to commercial interests or enterprises"); Hamman v. United States, 267 F.Supp. 420, 432 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968) (the term "denotes a commercial venture or enterprise"); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641 (D.N.J. 1960) (same).

"It has been held consistently that the Section 4 requirement of injury to 'business or property' contemplates pecuniary damages to some commercial interest." Note, *Standing to Sue Under Section 4 of the Clayton Act*, 35 Ohio St. L.J. 723, 727 (1974). *See also*, Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 Geo. Wash. L.Rev. 231, 233 (1961).

[29] The three decisions of the district court have been appealed to the Ninth Circuit. Arguments were held in December, 1978, and January, 1979, but in all cases the appellate court has withheld submission pending decision of the instant matter by this Court.

the Sherman and Clayton Acts in detail[30] and examined previous judicial constructions of the "business or property" limitation, which "have uniformly interpreted congressional intent as requiring a commercial nexus". *Gutierrez*, 425 F.Supp. at 1224; *Weinberg*, 426 F.Supp. at 883. Relying upon this Court's opinion in *Hawaii* and the Ninth Circuit's decision in *In re Multidistrict Vehicle Air Pollution*,[31] the court stated:

> "[I]t is apparent that consumers not claiming injury to any business or commercial interest lack standing to maintain an antitrust action for their injuries. The phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interests, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature." *Gutierrez*, 425 F.Supp. at 1225; *Weinberg*, 426 F.Supp. at 884 (emphasis in original).

The court concluded that an injury to a plaintiff's pocketbook was not an injury to a sufficient commercial interest to satisfy Section 4 and that a plaintiff must show an injury to a competitive interest in order to have standing to sue for a violation of the antitrust laws.

The foregoing line of cases consistently and forcefully demonstrates that a consumer for personal use suffers no cogniz-

[30] The Court noted that numerous references to the Congressional Record "indicate that in 1890 Congress was well aware of the fact that the new law would afford no remedy for the average consumer." *Gutierrez*, 425 F.Supp. at 1223; *Weinberg*, 426 F. Supp. at 882, *citing* 21 Cong. Rec. 2569 (1890) (Senator Sherman); *Id.* at 2610 (Senator Morgan); *Id.* at 2615 (Senator Coke); *Id.* at 3150 (Senator George). The district court also cited Congress' preoccupation with providing remedies for the injured businessman as evidence "that the 'business or property' language was meant to encompass injuries to businesses rather than to individuals." *Gutierrez*, 425 F.Supp. at 1224; *Weinberg*, 426 F. Supp. at 883.

[31] 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

able injury to "business or property" within the meaning of Section 4 of the Clayton Act. Unlike the businessman, the ordinary retail consumer like Reiter can allege no injury to competitive, commercial interests.

D. Cases Cited in Support of Reiter's Argument Are Inapplicable to the Narrow Question Before This Court.

The cases upon which Reiter and the *Amici* rely most heavily do not confront the issue whether a consumer for personal use, who asserts no injury to a commercial interest or enterprise, is injured in her "business or property" within the meaning of Section 4 of the Clayton Act. In fact, most of the cases cited in support of Reiter's attempt to expand the scope of Section 4 never even discuss the meaning of "business or property".

The apparent linchpin of Reiter's appeal is a case which, to the limited extent it even bears upon the meaning of the phrase "business or property", supports the respondent-manufacturers, not Reiter. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). That case did not involve a retail consumer transaction but rather a sale of iron pipe to a municipal corporation, acting in its proprietary capacity, for use in the city's waterworks system. Therefore, this Court did not face the issue whether an individual claiming injury to noncommercial property is entitled to sue for treble damages under Section 4.

This Court in *Chattanooga* acknowledged that "the main question of the case" was the applicable statute of limitations. However, in discussing whether the municipality was injured in its commercial property when allegedly victimized by price fixing, the Court noted that "the City was . . . injured in its

property . . . if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 396. Reiter and the *Amici* attempt to extrapolate from this statement that "property" means "money" so as to extend standing under Section 4 to the ordinary consumer at retail. But *Chattanooga* does not define the term "property", and the only category of property involved in the case was commercial in nature—pipe used in the City's "business of furnishing water." *Id.* at 396.[32] *Chattanooga* hardly controls here.

Reiter and the *Amici* compound their strained reading of *Chattanooga* with the curious notion that, because the city was injured in its capacity as a "consumer" buying pipe, the rationale of the case perforce extends to the "consumer" purchasing at retail for personal use. Brief for the United States at 11. *But see* Forkosch, *Antitrust and the Consumer (Enforcement)*, *supra*, at 299 ("the case is not direct authority for the principle that a consumer's interests may be made the subject for a suit by him for treble damages"). The myriad differences —economic, social, and political—between the governmental "consumer" and the individual "consumer" for personal use betray this logic. To suggest that Reiter and the City of Atlanta (or, for that matter, the United States) stand on the same footing for purposes of Section 4 in the Clayton Act is nonsense.

This Court's opinion in *Hawaii v. Standard Oil* puts *Chattanooga's* real import into perspective. In concluding that

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[32] The lower court opinion in *Chattanooga* indicates that the city was "furnish[ing] water to consumers, charging for same precisely as would a private corporation engaged in a like business." City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 25 (6th Cir. 1903).

"business or property" refers to "commercial interests or enterprises", *Hawaii* declared that a State can sue under Section 4 for injury to its commercial interests, citing *Chattanooga*. 405 U.S. at 262-63, and n.14. Accordingly, *Chattanooga* in no way expands the category of property covered by Section 4 to the noncommercial. That case merely defined one kind of injury to commercial property[33] and was so understood by its contemporaries.[34]

Apart from *Chattanooga*, Reiter and the *Amici* rely on *dicta* from a number of other decisions by this Court which did not address the meaning of "business or property", much less the issue on this appeal.[35] Reiter and the *Amici* apparently contend that these cases lend some kind of inferential or *sub silentio*

[33] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489-90 (1968) ("when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of the injury and damage within the meaning of §4"), citing *Chattanooga* and Thomsen v. Cayser, 243 U.S. 66, 88 (1917) ("the excess over what was reasonable was an element of injury"). *See also* Hawaii v. Standard Oil Co., 405 U.S. at 262 n.14 ("damages are established by the amount of the overcharge", citing *Chattanooga*); Donovan & Irvine, *Proof of Damages Under the Antitrust Law*, 88 U. Pa. L.Rev. 511, 512, 517 (1940) (among the accepted measures of antitrust damages is an increased "cost of doing business," citing *Chattanooga*).

[34] *See* United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916) (the person injured must be engaged in a business directly, citing *Chattanooga*).

[35] *See e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-14 (1978) (standing to sue accorded foreign government); Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477 (1977) (treble damages unavailable where sole injury is denial of anticipated increase in market shares); Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975) (price-fixed attorney fee schedules held unlawful); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (price-fixing by sugar beet refiners affects interstate commerce); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489-490 (1968) (elimination of passing-on defense). Brief for Petitioner at 8-9; Brief for the United States at 19-21; Brief for the States at 11-13.

support to their claims merely because the word "consumer" sometimes appears in them.

Reiter and the *Amici* also seem to have overlooked the principle that "a question not raised by counsel or discussed in the opinion of the court has [not] been decided merely because it existed in the record and might have been raised and considered." *United States v. Mitchell*, 271 U.S. 9, 14 (1926). The principal case in this regard is *Webster v. Fall*, 266 U.S. 507 (1925), in which this Court declined to reach the merits of plaintiff's suit on the ground of failure to join an indispensable party. The Court there stated:

> "Counsel for appellant directs our attention to other cases, where this court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. *The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.*" 266 U.S. at 511 (emphasis added).

As appears from this review, Reiter is unable to marshall any significant support in the case law warranting an expansion of consumer standing to sue under Section 4. In fact, the overwhelming weight of authority cuts the other way. Those cases which have come to grips with the "business or property" language rather uniformly have concluded that it refers to "commercial interests or enterprises". Accordingly, the

ordinary consumer for personal use, who asserts no such interest, is not injured in "business or property".

III. THE LIMITATION OF "BUSINESS OR PROPERTY" TO COMMERCIAL INTERESTS OR ENTERPRISES IS CONSISTENT WITH JUDICIALLY RECOGNIZED POLICIES ON THE PRIVATE RIGHT OF ACTION FOR DAMAGES UNDER THE ANTITRUST LAWS.

Courts have recognized that the treble damage remedy of Section 4 "superimposes a penalty upon compensation" and thereby provides a potential "windfall" to plaintiffs. *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F.Supp. 312, 317 (E.D. Pa. 1953), *aff'd* 211 F.2d 405 (3d Cir. 1954). They also have noted that overbroad extension of the field of potential treble damage claimants could entail massive burdens on the administration of justice and thereby impair the effective enforcement of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Therefore, the courts have been scrupulous not to expand this extraordinary remedy beyond the limits plainly required by the language, history and purposes of the Act.

Arguments that noncommercial consumers must have standing to provide a "deterrent" for antitrust violations and to compensate potential plaintiffs do not justify now including noncommercial purchasers within the "business or property" limitation of Section 4. It has never been held that alleged antitrust violators must be required to pay damages to every party allegedly injured. *Illinois Brick Co. v. Illinois*; *Hawaii v. Standard Oil Co.*, 405 U.S. at 262 n.14. Moreover while it may generally be assumed that the preservation of competition through deterrence of antitrust violations—whether through enforcement by the government or by private commercial interests—will serve the basic policy of protecting the noncommercial consuming public, it does not follow that the drastic remedy of a suit for treble damages, attorneys' fees, and costs must be made available directly to noncommercial purchasers in order to achieve that objective.

On the contrary, there are substantial policy grounds, the importance of which has been judicially acknowledged, for not extending this exceptional remedy to noncommercial plaintiff such as Reiter.

A. The Extension of the Treble Damage Remedy Would Not In Fact Result in Any Significant Additional Benefits to Noncommercial Consumers.

The additional benefits which Reiter and the *Amici* argue would flow from the expansion of standing under Section 4 are essentially illusory. Noncommercial consumer claims like those made here are generally filed as massive class actions which present enormous administrative problems for the courts. These types of cases are seldom, if ever, tried to conclusion on their merits. In those cases that overcome the severe manageability problems of enormous class actions, the amount of recovery to any individual, noncommercial consumer is likely to be insubstantial, the return to attorneys significant. In addition, the costs of such litigation are immense. Expense and delay detract from even a favorable result.

The fallacy of the notion "that the best way to protect consumers under the antitrust laws is through novel procedural devices which would permit very large numbers of small damage claims to be asserted in massive lawsuits" has been documented in Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L.J. 626 (1976). While the article is basically addressed to *parens patriae* and fluid recovery proposals, the authors demonstrate that massive noncommercial consumer suits "will neither confer significant benefits on consumers nor provide a workable deterrent for enforcing the antitrust laws in their interest." *Id.* Analyzing the noncommercial consumer class actions that had been filed, the authors stated:

> "As noted by Judge Medina in *Eisen v. Carlisle & Jacquelin* [479 F.2d 1005, 1018-19 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974)], 'not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits.' In some instances consumers were found to have suffered no compensable injury. In other instances the courts refused to certify classes because, among other defects, the sheer burden of processing millions of small claims through discovery and trial rendered the actions unmanageable. What is more, the supposed benefits to individual consumers were often so inconsequential that in the view of some courts the attorneys rather than the class members constituted the real parties in interest." *Handler & Blechman, supra*, at 628-29 (footnotes omitted).

The indirect costs to the American public of massive litigation also cannot be ignored. The litigation expenses for defendants, whether large or small, are often immense. This is generally true whether or not the claims are meritorious. Many of these costs are tax-deductible and, thus, the taxpaying public bears a part of the burden of litigation expense. Ultimately, any increase in the expenses of a business is reflected in the prices that are charged to its customers, whether other businesses or noncommercial consumers.

B. Any Possible Benefits to the Noncommercial Consuming Public Would Be Outweighed by the Added Burden on the Administration of Justice.

Even assuming that some benefits might accrue to members of the noncommercial consumer public, as distinguished from the attorneys, by extending the "business or property" limitation as argued by petitioner, these minimal benefits are far outweighed by the added burdens on the administration of justice. The great majority of, if not all, noncommercial consumer cases are brought as class actions, but class actions for damages by masses of small noncommercial purchasers of consumer goods present enormous problems of manageability, adequate representation, determining the real party in interest, notice to class members, ascertainment of damages, and superiority of class action to other remedies. These unwieldy consumer class actions in a practical sense impose a heavy burden on the judicial system and contribute greatly to the overloading of the courts. This serious overload is not a problem for the courts alone, but also a serious problem for litigants who seek justice.

The respondents are not suggesting that where Congress has unequivocally granted jurisdiction, the courts should not

accept consumer class actions because they would further strain already heavily burdened dockets. Rather, the point is that the courts may properly consider impact on the judicial system in determining whether Congress intended to confer the asserted right to sue.

This was precisely the approach recently taken in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In holding that indirect purchasers are not entitled to maintain an action for treble damages under Section 4, this Court recognized that such purchasers may be injured by antitrust violations to the same, or even greater extent, than direct purchasers. Nevertheless, consideration of the massive litigation and administrative burdens that would almost inevitably arise out of actions by indirect purchasers — and the resulting, adverse impact on the effective enforcement of the antitrust laws — led this Court to conclude that the treble damage action should appropriately be limited to actions by direct purchasers.

Many of the pragmatic considerations which led in part to the result in *Illinois Brick* are present in this case. Reiter's complaint encompasses a potential class of millions. She charges restraints affecting thousands of dealers. To assess the damages attributable to alleged anticompetitive activity by the respondent-manufacturers would require analysis of multi-tiered distribution channels comprised of manufacturers, independent dealers, and retail consumers. Further complicating this case are the claims of vertical dealer restraints which dominate the complaint and require analysis under the "rule of reason". *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). This is far more than a price-fixing case— its dimensions are staggering.

C. Existing Remedies Adequately Deter and Penalize Antitrust Violators.

The realistic limitation inherent in Section 4 has not and will not seriously hamper antitrust enforcement. Congress has provided other, adequate remedies as well as a strong deterrent to, and penalty for, antitrust violations.

The United States can bring criminal actions against individuals and corporations for violations of the antitrust laws. Each offense is now a felony, punishable by up to three years imprisonment and a fine of up to one hundred thousand dollars for individuals and one million dollars for corporations. 15 U.S.C. §1 (1976). In addition, the United States can bring civil actions for injunctions, enforceable by the court's potent contempt power, to prevent future violations. The Federal Trade Commission, acting under 15 U.S.C. §45 (1976), can also initiate civil actions against persons who engage in antitrust violations. Indeed, the present complaint is virtually a copy of the complaints filed against each of the respondent-manufacturers by the Commission several years ago.

Enforcement against antitrust violations is not confined to actions by the federal government. Many states have enacted statutes outlawing activities which would be in violation of the Sherman and Clayton Act provisions. These statutes often contain both civil and criminal penalties.[36]

Noncommercial consumers themselves have a direct remedy under Section 16 of the Clayton Act which authorizes suits for injunctive relief. This provision does not contain the commerical interest limitation of Section 4 and, thus, there is no question that a noncommercial consumer has standing to

[36] *See, e.g.*, Minn. Stat. §325.8018; Mo.Rev. Stat. §416.051; N.Y. Law, Ch. 20, Art. 22 (Consol.); Tex. Bus. & Com., Title 2, §§15.32, 15.33; Wis. Stat. §133.01.

sue.[37] Since the recent authorization of attorneys fees for such injunctive suits, there is incentive for the bar to undertake them, notwithstanding the lack of monetary awards. 15 U.S.C. §26 (1976). Given the enormous costs of litigation and the potential costs and competitive disadvantages of compliance with broad court orders, injunctive suits can have a substantial deterrent effect.[38] Moreover, injunctive suits are much more easily and quickly handled than massive retail consumer class actions because there are no damage claims to administer and determine and the numbers of plaintiffs can be kept small. There is, therefore, once again sound policy from the standpoint of the administration of justice to have a narrower standing criterion for damage actions than for injunctive suits.

Yet another enforcement tool is the *parens patriae* suit by a state attorney general for treble damages on behalf of a state's noncommercial consumers. This cause of action was created by Congress as part of the Antitrust Improvement Act of 1976, 15 U.S.C. §15c-h (1976), in order to permit a state to secure monetary relief on behalf of its natural citizens for injuries sustained by them as a result of antitrust violations. The *parens patriae* suit resolves the problems of manageability, damage duplication, and damage distribution inherent in

[37] *See* n.5, *supra*.

[38] This Court has been cited to a draft of a study on deterrence and a letter by one of the authors of that study. Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement: a Theoretical and Empirical Analysis*, Hoover Institution Technical Report ISDDE-1-78 (December 1978 Draft) and Brief for Petitioner, Add-1. The paper develops a simple model of collusive behavior with regard to price markups, making several assumptions about business activity. The model is discussed mathematically, but the empirical work done by the authors relates only to the white bread industry. The data is all taken from a time period before courts began imposing the significant, increased criminal antitrust penalties provided for in the 1974 amendments to 15 U.S.C. §1.

cumbersome class actions. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); Scher, *Emerging Issues under the Antitrust Improvements Act of 1976*, 77 Colum. L.Rev. 679 (1977).

Affirmance of the court below would not undercut the effectiveness of the *parens patriae* device. In the Antitrust Improvements Act of 1976, Congress apparently sought to create a *new* cause of action for the nonbusiness consumer. S.Rep. No. 803, 94th Cong., 2d Sess. 42 (1976); 122 Cong. Rec. S15, 417 (daily ed., Sept. 8, 1976). Indeed, the *Amici* States concede as much. See Brief for the States at 21-22.[39]

In light of the foregoing, there is no rationale for expanding Section 4 to grant noncommercial consumers the right to sue for treble damages.[40] Potential antitrust violators already face sufficient penalties to deter their illegal activities.

[39] Even if affirmance of the court below were to undermine in some manner the new *parens patriae* device, that would hardly constitute good reason to expand the "business or property" limitation in Section 4 of the Clayton Act deliberately chosen by Congress in 1890 and subsequently recognized by the courts. As this Court noted in *Illinois Brick*, the 1976 Act did not alter the definition of injured persons under Section 4, and the views of Congress in 1976 as to the scope of that section are not dispositive with respect to the intent of Congress in enacting Section 7 in 1890 or Section 4 in 1914. 431 U.S. at 733, n.14.

[40] Many of the cases in which noncommercial consumer classes have been certified or conditionally certified also involved substantial classes of persons alleging commercial injury. *E.g.*, In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied* 404 U.S. 871 (1972); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F.Supp. 1022 (E.D.Pa. 1970). Thus, even these "consumer" cases would still have been maintained without the noncommercial classes.

D. Whether to Expand Section 4 Standing to Noncommercial Consumers Is a Task for Congress, Not for the Court.

The language of Section 4 and the legislative history mandate a finding that only those persons injured in their commercial interests or enterprises have standing to sue for violations of the antitrust laws. Whether Section 4 should be expanded to encompass noncommercial retail purchasers is a matter for Congress and not for this Court.

To the extent Section 4 might ever warrant revision, the substantial economic and policy ramifications of now granting standing to noncommercial consumers make congressional review appropriate. As Mr. Justice Powell noted in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978):

> "A court, without benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country." *Id.* at 331 (Powell, J., dissenting).[41]

[41] Since this Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), committees of both the 95th and 96th Congresses have been considering legislation which would allow indirect purchasers to sue. Eleven bills were introduced in the two Chambers during the 95th Congress, and at least four have been introduced thus far in the present Congress. As of March 2, 1979 there had been 15 days of committee hearings, 116 witnesses, and 1,291 pages of printed hearing reports on the so-called Illinois Brick amendments. Some of the most recently proposed bills, *e.g.*, S.300, 96th Cong., 1st Sess., introduced by Senator Kennedy, would provide that "Any purchaser . . . in the chain of . . . distribution of goods or services shall, upon proof of payment . . . of any overcharge . . . be deemed to be injured within the meaning of Section 4, 4A, or 4C of this Act. . . ." If adopted, this bill would appear to extend the treble damage remedy to noncommercial purchasers—something which only Congress can do.

If existing remedies are inadequate to protect noncommercial consumers, it is for Congress to provide a solution. It is not within the province of a court to change significantly a legistive enactment to satisfy its own ideas of sound public policy.[42]

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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[42] cf. In re Hotel Telephone Charges, 500 F.2d 86, 91-92 (9th Cir. 1974); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974, *cert. denied* 421 U.S. 963 (1975).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING AND THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

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H.R. Rep. No. 499, 94th Cong., 2d Sess. (1976) 21, 22
S. Rep. No. 698, 63rd Cong., 2d Sess. (1914) 6
S. Rep. No. 803, 94th Cong., 2d Sess. (1976) 21, 22
L. Sullivan, Handbook of the Law of Antitrust (1977) 14
H. Thorelli, The Federal Antitrust Policy (1954) 9
Webster's Third New International Dictionary (1976) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING AND THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

This brief *amici curiae* is submitted by Forty-Nine States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

Whether a consumer who purchases a product or service for a nonbusiness (personal) use at a higher price because of an antitrust violation suffers injury to his or her "business or property" within the meaning of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

INTEREST OF *AMICI CURIAE*

The *amici* States are interested in this proceeding by virtue of the States' duty to protect the general welfare of their citizens and their role in encouraging and fostering the national economic policy of free competition embodied in the federal and state antitrust laws.

The decision of the court of appeals, denying standing under section 4 of the Clayton Act to nonbusiness consumers, uniquely affects the *amici* States by threatening the *parens patriae* authority recently granted to the States by Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976). The Act provides for the filing of civil damage actions by state attorneys general as *parens patriae* for natural persons injured in their property by violations of the antitrust laws. According to the Eighth Circuit, however, nonbusiness consumers—essentially the class of persons intended to be protected by the *parens patriae* provisions—do not have standing to sue under section 4. If the decision of the Eighth Circuit is affirmed, the right of nonbusiness consumers to recover on their own behalf will be denied. If the *parens patriae* authority of state attorneys general is interpreted to depend on the preexistence of standing for the natural persons represented, it will also be jeopardized.

Moreover, the court of appeals' decision challenges the *amici* States' ability to bring federal treble-damage class actions on behalf of nonbusiness consumers. In the past, the rights of injured consumers have been successfully vindicated in such actions. *See, e.g., In re Antibiotic Antitrust Actions,* M.D.L. No. 10 (S.D.N.Y., consol. Oct. 21, 1968). The decision may also inhibit the *amici* States and their political subdivisions from bringing federal treble-damage actions on their own behalf as large purchasers of a multitude of goods and services because, in some cases, it may be argued they have not been injured in their "business or property" in a "commercial" sense under the strained interpretation given these terms by the Eighth Circuit.

ARGUMENT

I. STANDING FOR NONBUSINESS CONSUMERS IS CONFERRED BY THE STATUTORY LANGUAGE OF SECTION 4.

A. "Any Person" May Recover for Injury to Property Resulting from a Purchase for a Nonbusiness Purpose

Denial of standing to nonbusiness consumers would create a distinction which is contrary to the plain meaning of the statute. Section 4 of the Clayton Act provides a damage remedy for "[a]ny person who shall be injured in his business or property" by a violation of the antitrust laws. The statute grants a right of recovery to "any person" suffering the requisite injury. "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

The requisite injury required is injury to "business *or* property." The language adopted by Congress is disjunctive, expressing a clear intent to allow recovery for injuries to property as distinguished from injuries to business.[1] Limiting re-

[1] "Property" has been defined as "the exclusive right to possess, enjoy, and dispose of a thing." Webster's Third New International Dictionary 1818 (1976). It is a separate and more extensive term than "business." *See, e.g.*, Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955, 964 (D. Utah 1964) ("Even though there [was] no 'business' subject to injury, injury to plaintiff's property would be actionable . . . ."); Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.' ").

covery to injuries resulting from purchases for business purposes would eliminate the words "or property" from the statute. Such a limitation would violate a principal maxim of statutory construction—that Congress intends each word in a statute to have an independent meaning and that, if it can be prevented, no clause or word should be considered superfluous. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

B. Injury to "Property' Includes Personal Monetary Loss

A clear exposition of the meaning of the term "property" was given in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). There, the city of Atlanta purchased iron pipe for use in the city waterworks. The city brought suit to recover damages caused by defendant's illegal arrangements which resulted in a price "much above what was reasonable or the pipe was worth." *Id.* at 395.

This court, through Justice Holmes, held that "[The city of Atlanta] was injured *in its property*, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. *A person whose property is diminished by payment of money wrongfully induced is injured in his property.*" *Id.* at 396 (emphasis added).[2] In discussing the specific right granted by Congress, Justice Holmes noted that "Congress had power to give an action for damages to an individual who suffers by breach of the [antitrust] law. . . .

[2] This language makes it clear that there is no support for the Eighth Circuit's view that "the city's claim arguably sought recovery for a business injury." Reiter v. Sonotone Corp., 579 F.2d 1077, 1082 (8th Cir. 1978). Even if the overcharge could have been interpreted as damage to the city's business, this Court did not reach that issue in *Chattanooga* because damage to the city's property was sufficient for purposes of standing.

The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff. . . ." *Id.* at 396-97 (emphasis added).

In *Chattanooga*, this Court gave a broad interpretation to the word "property." The Court's language does not merely suggest, but stands for the proposition that anyone, such as the plaintiff in this case, forced to pay more for a product by virtue of anticompetitive activity suffers injury to his or her property. The continued vitality of *Chattanooga* has been reaffirmed in recent years. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972) (a state, as a "consumer in the market place," suffers an actionable injury "through a 'payment of money wrongfully induced' "); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491 (1968) ("the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge").

II. THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS INTENDED TO GRANT STANDING TO NONBUSINESS CONSUMERS.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court examined the legislative history of section 4 of the Clayton Act and its predecessor, section 7 of the Sherman Act.[3] As noted by this Court, the Sherman Act "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the damage provisions of the Clayton Act "were conceived primarily as 'open[ing] the door of justice to every man . . .

[3] Section 4 of the Clayton Act, 15 U.S.C. § 15, was enacted in 1914 as the reenactment, without substantive change, of section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890). *See* S. Rep. No. 698, 63rd Cong., 2d Sess. 45 (1914).

and giv[ing] the injured party ample damages for the wrong suffered.' " *Id.* at 486 n.10.

As this Court's analysis in *Brunswick* suggests, the legislative histories of the Clayton and the Sherman Acts manifest the Congressional intent to grant standing to ordinary (nonbusiness) consumers, *see, e.g.*, 21 Cong. Rec. 1767-68, 2569, 2615, 2640, 3146-50 (1890); 51 Cong. Rec. 9073, 9198, 9270, 12939 (1914), although several Congressmen questioned the practicality and economic feasibility of consumer suits. *See, e.g.*, 21 Cong. Rec. at 2564 (Sen. Reagan), 2571 (Sen. Hiscock), 3146 (Sen. Reagan), 3150 (Sen. George) (only "rich men" or "men of spirit" were expected to contest illegal combinations).[4] Treble damages were provided and the jurisdictional amount in controversy requirement was eliminated to

[4] The Eighth Circuit cites the remarks of Senator George, 21 Cong. Rec. at 1767-68, 3147-48, 3150; Senator Hiscock, *id.* at 2571; and Senator Reagan, *id.* at 2564, as supporting its interpretation of the legislative history. 579 F.2d at 1080. Contrary to the circuit court's analysis, all three of these senators recognized that consumers had standing but questioned whether consumers would actually sue. Senator George proposed a class action remedy because "not one suit would ever be brought . . . by any person who is simply damaged in his character as a consumer" and, therefore, "the bill, so far as they are concerned [would] be a snare and a mere delusion." 21 Cong. Rec. at 3150. Senator Hiscock felt that "the consumer of the merchandise . . . had the right to follow [a] combination . . . and recover . . . damages," but would be unlikely to do so. *Id.* at 2571. Senator Reagan felt that "the great mass of people would not be able to employ counsel and go with witnesses to the circuit court" and, thus, "the remedy as presented [would be] inadequate." *Id.* at 2564.

The circuit court also cites the remarks of Senator Morgan, *id.* at 3149, as indicating an "[intent] to limit the class of persons able to bring a private damage action." 579 F.2d at 1080. In the discussion cited by the circuit court, Senator Morgan stated his opposition to *any* private damage remedy. Even though Senator Morgan opposed any private damage remedy, his comments concerning the Judiciary version indicated his belief that consumers had standing. "[W]e have gone further and given a personal remedy, to whoever may be injured in his business or property." 21 Cong. Rec. at 3149.

enable "persons who had suffered in a minor degree" to sue. *Id.* at 2612.

In contrast to this Court's analysis, the Eighth Circuit argues that when the Senate Judiciary Committee replaced Senator Sherman's original language "any person or corporation injured or damnified" with "any person . . . injured in his business or property," the Committee intended to preclude suits by nonbusiness consumers. The circuit court admits that "ordinary consumers arguably would have been included in if not encouraged by the bill as originally introduced"[5] and then relies on the change in the language itself as proof of Congressional intent to exclude "ordinary consumers" from the class of persons granted standing.[6]

The legislative history, however, gives no indication that the change in language was intended to restrict the class of

[5] 579 F.2d at 1080. Discussion during the Senate debate on the original bill makes it clear that "ordinary consumers" (nonbusiness consumers) were to have standing to sue:

> The right of action against the persons in the combination is given to the party damnified. Who is the party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? . . . The consumer is the party "damnified or injured."
>
> . . . .
>
> Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advance by the combination.

21 Cong. Rec. 1767-68 (1890) (remarks of Sen. George). In addition, references were made throughout the Senate debates to recovery for damages resulting from overcharges for various commodities which would be commonly purchased by nonbusiness consumers. The commodities mentioned included: beef, *id.* at 2470 (Sen. Allison), 2640 (Sen. Spooner); flour, *id.* at 2730 (Sen. Platt); molasses, *id.* at 2610 (Sen. Morgan); sugar, *id.* at 1768 (Sen. George), 2568 (Sen. Sherman), 2615 (Sen. Coke); "necessaries of life," *id.* at 1768 (Sen. George), 2461 (Sen. Sherman).

[6] Because the Eighth Circuit is forced to conclude that the legislative history provides an "inconclusive explanation" for the change, it is forced to rely on the change in language itself. 579 F.2d at 1080.

persons entitled to sue; to the contrary, Congress recognized the right of consumers to sue both before and after the bill emerged from the Senate Judiciary Committee. *Compare, e.g.,* 21 Cong. Rec. at 1767-68, 2569, 2571, 2615 *with id.* at 3146-50. That the bill was not substantively changed was emphasized by the comments made by Senator Hoar, the author of section 7 of the Committee version, when he introduced the Committee version to the Senate: "I shall not undertake to explain the bill, which is well understood."[7] If section 7 had been changed to deny standing to "ordinary consumers," an explanation certainly would have been given to the entire Senate. During the same discussion Senator Edmunds, also a member of the Judiciary Committee, noted that the Committee sought to use "terms that were well known to the law already."[8] The terminology used, as previously noted, clearly indicates that nonbusiness consumers were granted standing to sue for injuries to their property.

The Judiciary Committee's substitution of treble damages for double damages indicates that the Committee intended to strengthen and not weaken consumer standing. Moreover, the only debate on the Committee's draft concerned the possibility

[7] 21 Cong. Rec. 3145 (1890). The Judiciary Committee included Senators Coke, Edmunds, Evarts (New York), George, Hoar, Ingalls, Pugh, Vest, and Wilson (Iowa). While there is disagreement as to who authored various sections of the Judiciary Committee version, the authorities agree that Senator Hoar was the author of at least section 7. *See, e.g.,* J. Clark, The Federal Trust Policy 43 (1931); H. Thorelli, The Federal Antitrust Policy 212 (1954). The statement of Senator Hoar, as a member of the Committee and as the author of section 7, is entitled to considerable weight. *See, e.g.,* Wright v. Vinton Branch Bank, 300 U.S. 440, 463-64 (1937).

[8] 21 Cong. Rec. 3148 (1890). The Committee's concern for the specific language used makes it clear that language excluding recovery by nonbusiness consumers would have been used, had that been the Committee's intent.

of further strengthening consumer incentives to sue via a class action device.[9]

The Eighth Circuit also bases its decision on the legislative history of section 4 of the Clayton Act which adopted the "any person . . . injured in his business or property" langauge of section 7 of the Sherman Act.[10] The circuit court argues that, because the primary purpose of the Clayton Act was to protect small businesses, nonbusiness consumers were not meant to have standing. However, the court is unable to cite any legislative history indicating that the protection of small businesses was the sole intent of Congress. In fact, the legislative history supports the existence of consumer standing. *See, e.g.*, 51 Cong. Rec. 9073, 9198, 9270, 12939 (1914). The court also fails to recognize that many antitrust violators sell to both business and nonbusiness purchasers and that giving standing to nonbusiness purchasers will, in many cases, contribute to the protection of small businesses. *Cf. Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978) (interpreting section 4 to grant standing to foreign governments).

The court of appeals' interpretation of the legislative history defeats the Congressional purpose of providing "a remedy for '[t]he people of the United States as individuals,'

[9] *Id.* at 3147-51. This proposal was made by Senator George who was skeptical of the claim that treble damages would evoke consumer litigation. His concern centered on "the practical rather than theoretical obstacles to consumer actions," as recognized by the Eighth Circuit. 579 F.2d at 1080 n.6. The circuit court fails, however, to reconcile its recognition of this distinction with its conclusion, based on Senator George's remarks, that "Congress neglected or intentionally excluded" consumers. *Id.* at 1080.

[10] The Eighth Circuit recognizes that "Congress, by its enactment [of section 4 of the Clayton Act], did not intend to amend the Sherman Act." 579 F.2d at 1080. Thus, because standing for nonbusiness consumers existed under the Sherman Act, Congress intended it to exist under the Clayton Act.

especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977). As succinctly stated by Judge Nickerson when confronted by the issue currently before this Court, "it would seem anomalous to read the Clayton Act to exclude an action by the very persons sought to be protected." *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D.N.Y. 1978), *appeal dismissed*, No. 78-7389 (2d Cir. Jan. 3, 1979).

III. DECISIONS OF THIS COURT SUPPORT THE EXISTENCE OF STANDING FOR NONBUSINESS CONSUMERS.

A. Recent Decisions of This Court Recognize the Standing of Nonbusiness Consumers

Recent decisions of this Court have consistently recognized the existence of standing for nonbusiness consumers. Two decisions of particular significance are *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Goldfarb*, retail purchasers of private homes (clearly nonbusiness consumers) challenged, under sections 4 and 16 of the Clayton Act, a minimum-fee schedule established by a bar association for title searches. In holding that the use of the minimum-fee schedule constituted illegal price fixing, this Court made repeated references to consumers.[11] In light of the facts of the case, these references can

[11] 421 U.S. at 782 ("[I]n terms of restraining competition and harming *consumers* like petitioners the price-fixing activities found here are unusually damaging. . . . [because] *consumers* [can] not turn to alternative sources for the necessary service.") (emphasis added), 783 ("These factors coalesced to create a pricing system that *consumers* could not realistically escape.") (emphasis added), 792 ("[The State Bar's] activities resulted in a rigid

only be taken to refer to nonbusiness purchases of homes.[12]

In *Hawaii*, the State of Hawaii sought to recover damages in its proprietary capacity for overcharges paid for petroleum products it had purchased *and* for damages to its general economy. This Court held that, to prevent duplicative recoveries, Hawaii could not recover for injuries to its general economy because "consumers . . . may recover themselves under § 4." 405 U.S. at 264. Ordinary consumers could recover because "Congress [gave] private citizens rights of action for injunctive relief and damages for antitrust violations . . . ." *Id.* at 266. Hawaii could, however, recover for injuries suffered "in its capacity as a consumer in the marketplace, through a 'payment of money wrongfully induced.' " *Id.* at 262 n.14. In support of its decision, this Court noted that the United States could not recover for injury to its "business or property" "for general injury to the national economy . . . but only for those injuries suffered in its capacity as a consumer of goods and services." *Id.* at 265. Thus, private citizens, individual states, and the United States can recover as "consumers in the marketplace" for "payment of money wrongfully induced."

In addition to *Goldfarb* and *Hawaii*, other recent decisions of this Court have adverted to the right of consumers to sue for antitrust violations. *See, e.g., Pfizer Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978) (foreign governments have

price floor from which petitioners, as *consumers*, could not escape if they wished to borrow money to buy a home.") (emphasis added).

[12] As the Eighth Circuit notes, 579 F.2d at 1087 n.18, this Court did not specifically address the issue of consumer standing in *Goldfarb*. However, this Court does not hesitate to raise, *sua sponte*, issues not addressed by the parties to a lawsuit. *See, e.g.*, Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 511-14 (1973).

standing to sue as consumers because the antitrust laws were not intended as a remedy for American consumers only); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 740-41 (1977) (standing of direct consumers implicitly recognized while denying the offensive use of the "pass-on" theory); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (legislative history of the Sherman Act indicates that it was designed primarily as a remedy for consumers); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (ultimate consumers have the right to sue, but are unlikely to do so). The terms "consumers" and "ultimate consumers" as used in these opinions include ordinary, nonbusiness consumers such as the plaintiff in this case.

B. The Purchaser of a Product or Service Has a "Commercial Interest"

In *Hawaii v. Standard Oil Co.*, this Court stated in dictum that "[l]ike the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." 405 U.S. 251, 264 (1972). The Eighth Circuit misconstrues this language to require a "commercial injury"[13] in the sense of a purchase for a "business" or "commercial" purpose. The court then relies on this erroneous construction to support its denial of standing for consumers purchasing products or services for nonbusiness purposes.

The factual situation in *Hawaii* makes it clear that the language used by this Court was not meant to distinguish between purchases for business and nonbusiness purposes, but to distinguish between damage to a state resulting from its purchase of a product or service in "commerce" and damage to a

[13] *Compare* 579 F.2d at 1083 *with id.* at 1084, 1086.

state's general economy resulting from damage to its citizens.[14] A state (or any consumer) has standing to recover when it is injured by its direct participation in a commercial transaction because it has a "commercial interest." A state cannot, however, recover for injuries to others which affect its general economy because the injured parties themselves, the parties with the necessary "commercial interest," may recover.

An ordinary consumer who participates in a commercial transaction satisfies the "commercial interest" requirement of *Hawaii*. The end use of the product or service being purchased is irrelevant. Every purchase, whether for a business or a nonbusiness purpose, has the same effect on the market per dollar spent. Both business and nonbusiness purchasers have the same effect on the interplay of the forces of supply and demand and on the allocation of society's resources. Both involve "commerce" and thus entail a "commercial interest." *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) ("the exchange of . . . a service for money is 'commerce' in the most common usage of the word").

The plaintiff in *Hawaii* (the state suing for injuries to its general economy) and the plaintiffs in the cases cited therein,[15] as well as the plaintiffs in the cases relied on by the

[14] *See* L. Sullivan, Handbook of the Law of Antitrust 771 n.3 (1977).

[15] In *Hawaii* this Court relied on Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Hamman v. United States, 267 F. Supp. 420 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968); and Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641 (D.N.J. 1960), for the proposition that "the words 'business or property' . . . refer to commercial interests or enterprises." 405 U.S. at 264. *Roseland* and *Morristown* precluded plaintiffs with mere "expectancies" of engaging in business from recovering damages for conspiracies alleged to impede them. *Hamman* precluded widows of employees killed while working for an employer engaged in an unreasonable restraint of trade from recovering for loss of consortium. The plaintiffs in these cases did not allege injuries suffered as consumers in the market place, i.e., as participants in commercial transactions.

Eighth Circuit,[16] were not injured as a result of their participation in a commercial transaction. This distinguishes these plaintiffs from a consumer in the market place, who has the necessary "commercial interest" by reason of his or her direct participation in a commercial transaction. As stated by Judge Larson in the well-reasoned district court opinion in this case, " 'commercial interests' clearly [encompass] the interest of consumers who must pay more in the marketplace because of defendants' actions." *Reiter v. Sonotone Corp.*, 435 F. Supp. 933, 936 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978).

C. A "Competitive Injury" is Not Required for Standing

Intertwined with its "commercial interest" argument, the Eighth Circuit argues, based on *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973), that a "competitive injury" is required for standing under section 4. 579 F.2d at 1084. *GAF* involved an attempted corporate takeover with the target corporation alleging injury to its competitive position. A "competitive injury"

[16] In addition to *Hawaii*, the Eighth Circuit relies on Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); *In re* Multidist. Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); and Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), as "limit [ing] standing to those engaged in commercial ventures and enterprises." 579 at 1084. All three of these cases rely on *Hawaii* and are readily distinguishable from the instant fact situation. *Vehicle Air Pollution* precluded recovery for tort injuries such as health problems caused by defendants' alleged conspiracy to withhold automobile air pollution control technology. *Reibert* precluded an employee from recovering for the loss of his job which was allegedly caused by an anticompetitive merger. The plaintiffs in *Vehicle Air Pollution* and *Reibert* were not suing for damages sustained as consumers in the market place, i.e., as participants in commercial transactions. In *Tugboat*, the court held that plaintiff unions *had* standing because they were in the business of representing employees who had a commercial interest.

would be required in this situation. This case does not stand for the proposition that a purchaser in the market place must suffer a "competitive injury" to sue under section 4.

Moreover, the Eighth Circuit confuses the policy behind the antitrust laws of preserving and protecting competition, *see, e.g., Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940), with the standing requirements of section 4. Protection of competition does not require a plaintiff who has suffered injury to a competitive position; rather, granting standing to plaintiffs who may not have suffered a "competitive injury" will often contribute to the protection of competition. *Cf. Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978) (interpreting section 4 to grant standing to foreign governments).

IV. DENIAL OF STANDING TO NONBUSINESS CONSUMERS WOULD FRUSTRATE THE POLICIES UNDERLYING THE ANTITRUST LAWS.

This Court has repeatedly held that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958), and has emphasized the existence of "a strong national interest in antitrust enforcement." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977). The right of nonbusiness consumers to sue for treble damages furthers this national policy of fostering competition by encouraging private parties to act in the national interest.[17]

[17] *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. at 262 ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.' "); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.").

Section 4 has been recognized as an effective supplement to government enforcement of the antitrust laws. *E.g., United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Private suits are "one of the surest weapons for effective enforcement of the antitrust laws," *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965), because they create "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

Denial of standing to nonbusiness consumers would establish a judicially-created hiatus in the enforcement of the antitrust laws by rendering, at the very least, vertical and horizontal conspiracies aimed at *retail* purchasers immune from private damage actions. Clearly such an arbitrary gap is contrary to the policies of the antitrust laws. The antitrust laws were designed to "protect the victims of the forbidden practices as well as the public," *Radovich v. National Football League*, 352 U.S. 445, 454 (1957), and to "penaliz[e] wrongdoers and dete[r] wrongdoing." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

Last year while interpreting section 4 to grant standing to foreign governments, *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), this Court stated that:

> § 4 has two purposes: to deter violators and deprive them of " 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries." . . . To deny a foreign plaintiff injured by an antitrust vio-

> lation the right to sue would defeat these purposes. It would permit a price fixer or monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

Id. at 314-15. If the word "nonbusiness" is substituted for the word "foreign," this analysis describes some of the policy problems involved in denying nonbusiness consumers the right to sue. Such a denial would defeat the purposes of the antitrust laws and would permit a violator to keep his ill-gotten gains at the expense of his victims.

States and nonbusiness consumers have actively assisted in the enforcement of the federal antitrust laws. The *amici* States have brought numerous governmental-body class actions seeking damages for goods purchased by governmental entities (i.e., for states and governmental entities as consumer(s) in the market place).[18] *Amici* States have also maintained treble-damage suits on behalf of their citizen, nonbusiness consumers.[19] The Eighth Circuit's requirement that a plaintiff must establish "commercial or competitive injury" in order to have section 4 standing clouds the *amici* States' ability to maintain

[18] *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); *In re* Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa., consol. Mar. 3, 1978); *In re* Cement & Concrete Antitrust Litigation, M.D.L. No. 296 (D. Ariz, consol. Sept. 12, 1977); *In re* Rebar Antitrust Cases, No. C-75-767-M (W.D. Wash., filed Nov. 3, 1975); *In re* Sugar Antitrust Litigation, M.D.L. No. 201 (N.D. Cal., consol. June 2, 1975); *In re* Master Key Antitrust Litigation, M.D.L. No. 45 (D. Conn., consol. Jan. 14, 1971).

[19] *See, e.g.*, California v. B.F. Goodrich Co., No. 78-2263WAI (N.D. Cal., filed Sept. 22 1978); Colorado v. Valley Petroleum Co., No. 77-W-352 (D. Colo., filed Apr. 12, 1977); *In re* Petroleum Prods. Antitrust Litigation, M.D.L. No. 150 (C.D. Cal., consol. Aug. 31, 1976); *In re* Antibiotic Antitrust Actions, M.D.L. No. 10 (S.D.N.Y., consol. Oct. 21, 1968).

these federal treble-damage actions. This in turn frustrates the policies of deterring violators and depriving them of the "fruits of their illegality," and compensating victims of antitrust violations for their injuries.

Contrary to the traditional formulations of the scope and purpose of the antitrust laws, the court of appeals' decision reduces antitrust standing to an inquiry into the status and purposes of the injured party. For example, if the plaintiff in this case had purchased a hearing aid because she needed it both to work as a stenographer and to use at home, would the purchase have been for a business or a nonbusiness purpose? Would she be a business or a nonbusiness purchaser? According to the Eighth Circuit, if price-fixed goods are used for business purposes, actionable injury exists; if the goods are used for nonbusiness purposes, the injury is not recognized by our national economic policy and the overcharged purchaser is left without remedy. The pivotal inquiry becomes "did the plaintiff purchase the product or service for a business purpose" instead of the statutorily required inquiry of whether the plaintiff was "injured in his business or property." The elaborate and tangential inquiry required to determine if a product was used for a business or a nonbusiness purpose would frustrate antitrust enforcement and this Court's desire to keep "already protracted treble-damage proceedings" as simple as possible. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977). It would also conflict with this Court's desire "not [to] add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

"As a charter of freedom, [the antitrust laws have] a generality and adaptability comparable to that found to be desir-

able in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). The antitrust laws must be interpreted broadly, adapting to the changes in American Society. Purchases by consumers for nonbusiness uses today represent a crucial part of the commerce of this country and a driving force of our economy. If the antitrust laws are to exercise meaningful control over the functioning of our economy, the "business or property" language of the Act must be interpreted to grant nonbusiness consumers standing to sue antitrust violators.

V. DENIAL OF STANDING TO NONBUSINESS CONSUMERS MAY AFFECT THE *PARENS PATRIAE* AUTHORITY GRANTED TO STATE ATTORNEYS GENERAL.

Amici States are uniquely interested in this litigation because the court of appeals' decision may affect the *parens patriae* authority recently granted to them by Congress. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976), empowers state attorneys general to bring civil damage actions on behalf of natural persons[20] injured in their property by an antitrust violation.

The Eighth Circuit decision is apparently based, in part, on the belief that *parens patriae* actions "will effectively protect the interests of consumers." 579 F.2d at 1086. If the decision of Eighth Circuit is affirmed, this view cannot be supported unless this Court interprets the *parens patriae* provisions to create a *new* cause of action in addition to simply creating a

[20] The class of persons protected by the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 are "natural persons," excluding "proprietorships or partnerships," 15 U.S.C. § 15g(3) (1976), in essence nonbusiness consumers, the class denied standing by the Eighth Circuit.

more effective procedure for aggregating and litigating existing claims.[21] While this Court has recently suggested in dictum, relying on the House Report, that Congress intended *parens patriae* authority to be procedural only,[22] the Senate viewed the Act as creating a new cause of action.[23] The *amici*

[21] If the decision of the Eighth Circuit is affirmed, nonbusiness consumers will not have preexisting rights of recovery under section 4. Thus, if *amici* States' *parens* authority is interpreted to be entirely procedural, *amici* States will not be able to sue as *parens patriae* on behalf of nonbusiness consumers.

[22] In Illinois Brick Co v. Illinois, 431 U.S. 720, 734 n.14 (1977), this Court, relying on H.R. Rep. No. 499, 94th Cong., 2d. Sess. (1976), stated that:

> Congress made clear, however, that [the *parens patriae* provisions] did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device — *parens patriae* actions by States on behalf of their citizens — to enforce existing rights of recovery under § 4.

[23] While this Court cited the House Report in *Illinois Brick*, it was the Senate version of the legislation which was enacted. The Senate Judiciary Report viewed the *parens patriae* provisions as creating "a new statutory cause of action for States. . . . to recover monetary and other relief, whenever [they can] show that a defendant's Sherman Act violation caused damage to the natural persons residing in such State[s]." S. Rep. No. 803, 94th Cong., 2d Sess. 42 (1976). Statements made by the bill's principal author, Senator Hart, during the Senate debate on the compromise version (Byrd motion) which was subsequently enacted, indicate that a new cause of action was intended. After noting that "[t]he original House-passed bill purported to be entirely procedural" and "[t]he original Senate-passed bill created a separate cause of action," Senator Hart stated that:

> The Byrd motion adopts the basic Senate approach, but contains some changes in the language in order to satisfy some of the concerns of the House sponsors. The effect and intention of this provision is the same as contained in S. Rep. No. 94-803. State attorneys general are authorized to bring suits for violations of the Sherman Act, in the name of the State as parens patriae, in effect as trustees for the residents of the State. A *direct cause of action is granted to States* to avoid the inequities and inconsistencies of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 of the FRCP, and the rights of consumers to recover damages under section 4 of the Clayton Act.

122 Cong. Rec. S15,417 (daily ed. Sept. 8, 1976) (emphasis added).

States strongly believe that the better interpretation is that a new cause of action was created.

Regardless of whether the *parens patriae* provisions give the States a separate cause of action, it is clear that the 94th Congress believed consumers already had standing under section 4.[24] Although the views of a later Congress are not controlling as to the intent of an earlier Congress, this Court has recognized their relevance. *Cf. Califano v. Sanders*, 430 U.S. 99, 105-06 (1977) (use of a 1976 amendment to demonstrate the understanding of Congress concerning the intent of a 1948 statute).

If this Court interprets section 4 to deny standing to non-business consumers, it will contradict a nearly unanimous line of cases and will frustrate the desires of the Congresses which enacted the Sherman Act, the Clayton Act, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

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[24] Both the House and Senate Reports make it clear that the intent of the bill was to redress a "legislative omission" by providing individual consumers with a *practical* means for recovering damages suffered.

> Under § 4 of the Clayton Act, any person, *including any consumer*, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question.

H.R. Rep. No. 499, 94th Cong., 2d Sess. 6 (1976) (emphasis added). *Accord*, S. Rep. No. 803, 94th Cong., 2d Sess. 39-43 (1976).

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

KATHLEEN R. REITER, PETITIONER

v.

SONOTONE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Miscellaneous—Continued Page

Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of Law and Economics 7 (1966) 12, 13, 14
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H.R. Rep. No. 94-499, 94th Cong., 1st Sess. (1975) 30

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Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221 (1955) 12
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S. Rep. No. 698, 63d Cong., 2d Sess. (1914) 18
S. Rep. No. 94-803, 94th Cong., 2d Sess. (1976) 30
H. Thorelli, *The Federal Antitrust Policy* (1954) 12, 13, 14, 16, 17
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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Private actions for damages under Section 4 of the Clayton Act, 15 U.S.C. 15, have served an important role, supplemental to that of public actions, in enforcing the antitrust laws. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). The United States therefore has an interest in preserving the effectiveness of private actions, and it has participated as amicus curiae in many private antitrust cases that this Court has considered in recent years. See, *e.g.*, *City of*

Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952, argued Oct. 11, 1978.

The United States has a special interest in this case because Section 4A of the Clayton Act, 15 U.S.C. 15a, gives the United States a right to recover damages for injuries to its business or property resulting from violations of the antitrust laws. The United States purchases, as consumer, substantial quantities of goods. In these cases the United States may stand in the same relation to any price fixer as petitioner stands to the persons from whom she buys, and the adoption of the court of appeals' position therefore could restrict the right of the United States to recover for loss caused by overcharges made by sellers.

QUESTION PRESENTED

Whether consumers who pay higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15.

STATEMENT

Petitioner commenced this suit on behalf of a class seeking treble damages from respondents, five hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. 15.[1] The complaint alleges that

[1] Petitioner seeks to represent a class of all persons in the United States who have purchased hearing aids from respondents. No decision on the propriety of this class definition has been made.

these manufacturers have committed a variety of antitrust violations that damaged petitioner and members of her class by causing them to pay higher prices for hearing aids and services than would have prevailed in a competitive marketplace.[2] Respondents argued that petitioner and the class have no treble damages remedy under Section 4 because they have not suffered any business or commercial injury.[3]

The district court rejected respondents' argument. It pointed out that Section 4 authorizes recovery by persons injured in their "business or property" and that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), establishes that "property" includes "the money of the plaintiff" (Pet. App. A-9). The term "property" would be redundant, the district court reasoned, if it embraced only business interests (*ibid.*). The court also observed that the legislative history of Section 4 described in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), indicates that Congress intended to give a treble damages remedy to retail consumers. A requirement that plaintiffs establish

[2] The complaint alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. 14. It challenges various constraints that respondents allegedly placed on dealers in the distribution and sale of hearing aids. In particular, the complaint charges that respondents conspired to fix the prices at which their dealers would sell hearing aids to consumers (Pet. App. A-13).

[3] Respondents also argued that the alleged injuries were too remote from the antitrust violations to confer standing to sue for damages under Section 4. That issue was not reached by the court of appeals (Pet. App. A-20 n.9).

injury to a business interest as a prerequisite to suit would frustrate this intent, the court reasoned (*id.* at A-9 to A-11).

The district court certified the case for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals reversed (579 F.2d 1077; Pet. App. A-12 to A-31). It held that consumers who allege "no injury of a commercial or competitive nature are not injured in their property under Section 4 of the Clayton Act" (*id.* at A-30 to A-31) and therefore may not recover damages for antitrust violations.[4] The court of appeals relied on certain legislative history, the perceived absence of a square holding to the contrary by this Court or a court of appeals, and its belief that many "gigantic consumer class actions" are anticompetitive and might be used to exact unfair settlements from small or medium-sized businesses and thereby "preserve an oligopolistic economic climate" (*id.* at A-28, A-29).

[4] The court of appeals did not address the question whether petitioner's treble damages action is foreclosed by the direct purchaser requirement of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (Pet. App. A-14 n.3). Petitioner contended in the courts below that this case falls within an exception to the direct purchaser requirement described in *Illinois Brick*. See 431 U.S. at 736 n.16. Although the question has not yet been decided in this case, we believe that *Illinois Brick* does not bar a suit of this kind. The district court described petitioner as a "classic consumer plaintiff" (Pet. App. A-3) because the complaint charges a conspiracy to fix the retail price of a consumer product which petitioner purchased. The direct victim of such a retail price maintenance scheme is the consumer. Because "market forces have been superseded" by retail price maintenance schemes (431 U.S. at 736 n.16), the antitrust overcharge is not "passed on" to the consumer through intervening economic markets, and the trial court ordinarily need not apportion damages among multiple levels of purchasers.

A petition for rehearing *en banc* was denied by a vote of four to three. The three dissenting judges stated that the panel's decision conflicted with the rationale of this Court's decisions in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, and *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), effectively nullified the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h, and was an improper substitution of judicial policy for the legislative view of the desirability of treble damages actions (Pet. App. A-31 to A-33).

SUMMARY OF ARGUMENT

Section 4 of the Clayton Act, 15 U.S.C. 15, authorizes suit by "any person" injured in his "business *or* property" (emphasis supplied). The use of the disjunctive is significant. The provision that damages may be recovered for injuries to "property" confirms that Section 4 is not limited to business harm. Understood in its ordinary sense, "property" embraces all forms of wealth, including money. Thus a consumer "whose property is diminished by a payment of money wrongfully induced is injured in his property" and may bring suit under Section 4. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906).

The legislative history shows that Congress intended to protect consumers under the Sherman Act of 1890 and the Clayton Act of 1914. Congress intended the treble damages remedy prescribed in those Acts to "give private citizens who are injured by these combinations or monopolies for the advancement of cost * * * a civil remedy in the courts" (21 Cong. Rec. 2563 (1890) (remarks of Sen. Hoar)). The decisions of this Court recognize that purpose. See, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312-315 (1978) (upholding consumer claims of foreign nations and stating that Section 4 protects "American consumers"). Even if there is a requirement that the injury to property take place in the course of commercial affairs, that requirement is satisfied here, because hearing aids are purchased in commercial transactions. That consumers are not in the business of buying hearing aids should be irrelevant: the purchase is commercial nonetheless.

Suits under Section 4 not only compensate the victims of antitrust violations but also "deter violators and deprive them of 'the fruits of their illegality.'" *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 314. Injured parties suing for treble damages thus serve as "private attorneys general" who preserve competitive market conditions. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). Unless consumers may recover damages for the injuries caused directly to them, there will be little deterrence of conspiracies to increase the price of consumer goods. Consumers

are the only direct victims of retail price fixing conspiracies and the only private parties in a position to bring suit against them. The importance of preserving competition in retail markets can scarcely be overstated. Retail nonbusiness consumers purchase more than $1.2 trillion in goods and services annually.

The court of appeals believed that consumer class actions frequently are meritless and impose undue burdens on small business firms. The court stated that the deterrent value of such suits does not outweigh their harmful effects, and it concluded that government enforcement should supersede private consumer litigation (Pet. App. A-28 to A-29). But that position conflicts with the congressional determination that private suits are essential to achieve redress and deterrence. Courts may not substitute their views for those of Congress concerning the appropriate method to enforce the antitrust laws. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Moreover, the court's conclusion that small business firms suffer disproportionate burdens from antitrust litigation is unsupported. Small businesses are unlikely defendants in such actions. They do not have the means to satisfy large treble damages judgments, and they usually do not have the market power to inflict the sort of damages for which plaintiffs would recover. Small businesses are often members of the class of plaintiffs who seek redress from antitrust violators, but they are rarely named as defendants in such proceedings.

Unless consumers have a right to recover damages, the *parens patriae* title of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. 15c-15h, would be nullified. That Act provides that state attorneys general may bring suit to obtain redress for property injuries suffered by consumers as a result of antitrust violations. The *parens patriae* provision does not create new rights. It merely provides a new procedure to assert the Section 4 claims of consumers. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 734 n.14 (1977). If, as the court of appeals held, consumers do not suffer "property" injuries as a result of antitrust overcharges, and may not bring suit under Section 4, then there are no consumer claims to be vindicated under the *parens patriae* provision. The Court should construe Section 4 in a way that avoids this frustration of the intent of Congress.

ARGUMENT

CONSUMERS WHO PAY HIGHER PRICES FOR GOODS OR SERVICES AS A RESULT OF ANTITRUST VIOLATIONS SUFFER INJURY TO THEIR "PROPERTY" WITHIN THE MEANING OF SECTION 4 OF THE CLAYTON ACT

Based on its view of legislative history and public policy, the court of appeals held that consumers injured by antitrust violations may not bring suit under Section 4 of the Clayton Act. In the court's view, Congress' sole purpose in enacting Section 4 was to protect business competitors against commercial injury. Although the court correctly concluded that Congress intended to permit recoveries to redress

"business" injuries, we submit that Section 4 was not limited to such injuries. An analysis of the text and legislative history of Section 4 establishes that it "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977).

A. A Literal Reading Of Section 4 Of The Clayton Act Shows That Consumers Injured By Antitrust Violations May Bring Suit

"The starting point in every case involving the construction of a statute is the language itself.'" *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 6. Courts should "read the statutory language in its ordinary and natural sense." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941) (construing Section 7 of the Sherman Act). So read, Section 4 establishes that consumers may recover for their economic losses.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

The breadth of the grant is demonstrated by the provision that "any person" may recover for antitrust injuries. The statute is "inclusive rather than exclusive," extending to "natural persons" as well as

corporations. *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978).

Persons suing under Section 4 may obtain redress for two kinds of injury. They may recover for injury to their "business," and they may recover for injury to their "property." The term property encompasses all forms of wealth, including money. Whether or not an overcharged consumer can demonstrate business injury, he may recover if his wealth has been diminished by an antitrust violation.

The contrary holding of the court of appeals, which limits the coverage of Section 4 to business injuries, ignores the distinction between "business" and "property." The court's interpretation replaces the statutory expression "business *or* property" with "business property." It eliminates the disjunctive employed by Congress and thereby deprives the term "property" of independent significance. That approach disregards the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" (*Colautti* v. *Franklin*, No. 77-891 (Jan. 9, 1979), slip op. 13). Each of the words in the disjunctive expression should be given its "separate meaning" (*FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 11).

This Court discussed the "business or property" phrase more than 70 years ago; it concluded that the words have different meanings, and that overcharged consumers are injured in their property. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). In *Chattanooga* a municipality brought

suit against a supplier of pipe. The action was brought "on the ground that the [plaintiff], as a consumer, has been compelled to pay more for the goods it purchased by reason of the fact that the seller was a party to an illegal combination" (*id.* at 391). Suit on that ground was impossible, the defendant argued, because the antitrust laws were intended only "to protect the independent trader by giving him a right of action if injured in his business or property * * *" (*ibid.*). This Court disagreed, holding that the statute supported the plaintiff's right to recover:

> The city was * * * injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

Id. at 396. *Chattanooga* controls here. It cannot be distinguished, as the court of appeals incorrectly concluded (Pet. App. A-21), because the city "arguably" suffered an injury to its business of being a municipality. This Court's reasoning in *Chattanooga* turned on the fact that the city was injured in its capacity as a consumer. The Court held that price increases caused by antitrust violations reduce the "property" of the purchaser, which is a sufficient basis for recovery.[5]

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[5] The vitality of *Chattanooga* is shown by this Court's repeated reliance on it. See, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489-490 (1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 316 nn.15-16.

B. The Legislative History Confirms That Congress Intended To Authorize Awards Of Damages To Injured Consumers

The principal basis for the court of appeals' conclusion that consumers may not recover damages under Section 4 was the belief that Congress intended to foreclose consumer remedies (Pet. App. A-14 to A-19). A review of the legislative history discloses, however, that Congress' objective in enacting the antitrust laws was to protect consumers, and that consumers were intended to have remedies.

1. *The primary purpose of the Sherman Act was consumer protection*

In December 1889 Senator Sherman introduced the bill that later became the Sherman Act of 1890.[6] Section 1 of the bill (S. 1, 51st Cong., 1st Sess. (1889)) provided:

> [A]ll arrangements, contracts, agreements, trusts, or combinations * * * made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production * * * and all arrangements, contracts, agreements, trusts, or combinations * * * designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

[6] The legislative history is recounted in Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Economics 7, 14-21 (1966); H. Thorelli, *The Federal Antitrust Policy* 166-232 (1954); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221 (1955).

During debates on the measure, Senator Sherman repeatedly referred to the need to protect consumers from overcharges resulting from combinations and conspiracies.[7] See, *e.g.*, 21 Cong. Rec. 2457 (1890) ("the law of selfishness, uncontrolled by competition, compels [the combination] to disregard the interest of the consumer * * * [I]t tends to advance the price to the consumer of any article produced * * *"); *id.* at 2460 ("The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination * * * The aim is always for the highest price that will not check the demand, and, for most of the necessaries of life, that is perennial and perpetual"); *id.* at 2461 ("These trusts and combinations are great wrongs to the people * * * They increase beyond reason the cost of the necessaries of life and business * * *"). See also the remarks of Senator Pugh, *id.* at 2558 ("the existence of trusts and combinations to limit the production of articles of * * * commerce for the purpose of * * * increasing prices to consumers has become a matter of public history, and the magnitude * * * of the evils resulting

[7] As Professor Bork has pointed out, "[t]he views of Senator Sherman * * * are crucial to an understanding of the intent underlying the law that bears his name. Sherman was the prime mover in getting antitrust legislation considered and passed by the Senate. He was also by far the most articulate spokesman for antitrust in Congress." *Legislative Intent and the Policy of the Sherman Act, supra*, at 14. Accord, H. Thorelli, *The Federal Antitrust Policy, supra*, at 213.

directly to consumers * * * are known and admitted everywhere"). Even opponents of the bill, who favored different measures to govern anticompetitive agreements and combinations, emphasized the need to protect consumers against enhanced retail prices resulting from breakdowns in competition. See, *e.g.*, remarks of Senator George, 21 Cong. Rec. 1767-1768, 3147-3149 (1890).

Although the Senate Judiciary Committee rephrased Senator Sherman's bill before enactment, there is no suggestion that the underlying purpose of the statute changed.[8] Senator Sherman voted in favor of the bill as redrafted by the Judiciary Committee. 21 Cong. Rec. 3145 (1890). And during debates on the amended bill in the House of Representatives, the need to protect consumers by passage of the law was emphasized once again:

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[8] Both houses passed the bill following the Senate Judiciary Committee's redraft. See H. Thorelli, *The Federal Antitrust Policy, supra*, at 199-200, 209-210. In its final form, Section 1 of the statute prohibited

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * *.

Section 2 prohibited any person to

> monopolize or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several States * * *.

See 26 Stat. 209. As Professor Bork notes, "though Sherman's bill was completely rephrased by the Judiciary Committee * * * the final bill, in its substantive policy aspects, embodied Sherman's views." *Legislative Intent and The Policy of the Sherman Act, supra*, at 14-15.

> [T]he very object of these giant schemes of combined capital * * * [is to] repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased * * * We know that by such means the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and * * * have stolen untold millions from the people.

21 Cong. Rec. 4101 (1890) (remarks of Rep. Heard). See also *id.* at 4098 (remarks of Rep. Taylor); *id.* at 4102 (remarks of Rep. Fithian).

In sum, the legislative history amply supports the conclusion that "[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription." R. Bork, *The Antitrust Paradox* 66 (1978).

2. *Congress intended to authorize recoveries by overcharged consumers*

Congress intended to help consumers obtain the substantive benefits of the antitrust laws through a specific device: consumers injured by antitrust violations were given a private damages remedy in federal court. Senator Sherman's original bill, S. 1, 51st Cong. 1st Sess. Section 2 (1889), provided that "any person or corporation injured or damnified" by an illegal combination or agreement could sue to recover "the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination." In debates concerning this provision, Senators Sherman and

Hoar[9] agreed that "the purpose [is] * * * to give private citizens who are injured by these combinations or monopolies for the advancement of cost or preventing men from freely competing, a civil remedy in the courts." 21 Cong. Rec. 2563 (1890). The provision was intended to give "a private remedy to every person injured." *Ibid.* To that end, Congress authorized private suits without regard to the amount in controversy:

> Sometimes the damages would be too slight to give the courts of the United States jurisdiction. In the case of a single individual whose bread has been advanced in price or whose small expenditures have been somewhat increased, there is no remedy for him. * * * * * Now, sir, under these circumstances it is important to citizens that they should have some remedy in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered.

21 Cong. Rec. 2569 (1890) (remarks of Sen. Sherman). The availability of attorney's fees, costs, and punitive damages in such actions, Senator Sherman believed, would encourage individual consumers to bring suit.[10] *Ibid.* See also *id.* at 2612 (remarks of Sen. Teller).

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[9] Senator Hoar was a member of the Judiciary Committee that redrafted Senator Sherman's bill and is believed to be the author of the treble damages provision contained in the final version. See H. Thorelli, *The Federal Antitrust Policy, supra,* at 213.

[10] For this reason, Senator Sherman rejected the contention of his opponents that an individual consumer would not have an incentive to bring suit to recover the "enhanced price that he has to pay for a commodity in the market." *Id.* at 2610.

As finally enacted, the Sherman Act created a right of action in favor of "[a]ny person who shall be injured in his business or property" by a violation of the Act, without respect to the amount of controversy. The statute authorized treble damages plus the cost of prosecuting the suit, including a reasonable attorney's fee. See Section 7 of the Act, ch. 647, 26 Stat. 210.[11] Although opponents of the measure objected that it was not sufficiently helpful to injured consumers because procedural devices such as class actions were not prescribed, no one suggested that recovery should be denied to consumers.[12] See 21 Cong. Rec. 1767-1768, 3147-3148, 3150 (1890) (remarks of Sen. George). Proposals for class litigation were rejected only because Congress then believed that such procedures could engender complications that would retard the prosecution of consumer claims.[13] See the remarks of Sen. Edmunds, *id.* at 3148. Senator Edmunds stressed that the scope of relief was adequate as it

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[11] Section 7 was "only a rewriting by Senator Hoar of Section 2 of [the original] bill with the addition of the triple damage provision of the old Statute of Monopolies." H. Thorelli, *The Federal Antitrust Policy, supra,* at 213.

[12] Hyperbolic statements of opponents of the legislation predicting that consumers would be encumbered by procedural difficulties are, of course, no ground for restricting the coverage of the statute. See *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 204 n.24 (1976).

[13] Today, of course, the Federal Rules of Civil Procedure authorize class actions within guidelines intended to facilitate such litigation. See Fed. R. Civ. P. 23. In addition, Congress has created new procedures by statute to promote collective litigation of consumer antitrust claims. See pages 29-32, *infra.*

stood, allowing "everybody" to sue "anybody who wrongs him" without regard to the amount in controversy. *Ibid.*

3. *Congress facilitated consumer suits under Sections 4 and 5 of the Clayton Act*

The Clayton Act, enacted in 1914, expanded the private remedy that had been created by the Sherman Act. The amendment made treble damages available to any person injured in his business or property by "anything forbidden in the antitrust laws." See Section 4 of the Clayton Act, ch. 323, 38 Stat. 731.[14] Aside from permitting treble damages suits for both Sherman and Clayton Act violations, the provision did not alter the basic grant of relief. See *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 311. Congress demonstrated its understanding that consumers could recover damages by providing in Section 5 of the Clayton Act that judgments obtained by the United States against an antitrust violator would be "*prima facie* evidence" against the violator in private suits.

The *prima facie* evidence provision was "intended to help persons of small means" who wished to seek redress for antitrust injuries. See H.R. Rep. No. 627, 63d Cong. 2d Sess. 14 (1914); S. Rep. No. 698, 63d Cong. 2d Sess. 10 (1914). Congress' purpose in

[14] The Clayton Act was designated as "An Act to supplement existing laws against unlawful restraints and monopolies * * *." *Ibid.* Once again, consumer protection received emphasis as a primary statutory goal. See 51 Cong. Rec. 14213, 14216 (1914) (remarks of Sen. Shields); *id.* at 14222-14223 (remarks of Sen. Thompson); R. Bork, *The Antitrust Paradox*, *supra*, at 63.

adopting this provision was to facilitate suit "by individuals" (remarks of Sen. Walsh, 51 Cong. Rec. 13851-13852 (1914)), and the "poor man" (remarks of Sen. Thompson, *id.* at 14222). See also *id.* at 9073 (remarks of Rep. Webb). Congress recognized that deterrence of antitrust violations would be maximized by allowing suit not only by the injured "business man," but also by "the individual who is harmed by these practices" (*id.* at 16274) (remarks of Rep. Webb).

The Clayton Act thus carried forward the consumer protection goals of the Sherman Act. Congress retained the Sherman Act's provision entitling consumers to recover treble damages and added new procedures intended to help individual litigants maintain suits that otherwise would be impracticable. The legislative history confirms this Court's construction of the statute in *Chattanooga* that consumers suffering overcharges from antitrust violations may recover treble damages.

C. The Purposes Of Section 4 Are Served By Consumer Suits

1. Recent decisions of this Court that analyze the purposes served by Section 4 underscore the conclusion that consumers may recover for their direct losses. For example, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 486 n.10, the Court stated that the treble damages remedy serves "primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." Section 4 " 'open[s] the door of justice to every man, whenever he may be injured by those who violate the

antitrust laws * * *.'" *Ibid.* See also *Pfizer Inc.* v. *Government of India, supra,* which holds that foreign governments may seek damages from domestic pharmaceutical manufacturers. Each of the plaintiffs in *Pfizer* claimed injury in its capacity as "a purchaser of antibiotics." 434 U.S. at 310. In light of the "expansive remedial purpose" of Section 4 (*id.* at 313), the Court sustained these consumer claims (*id.* at 312; citations omitted):

> The Court has previously noted the broad scope of the remedies provided by the antitrust laws. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." * * * And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition.

The Court repeatedly stated that Section 4 authorizes recovery by "American consumers." See 434 U.S. at 313, 314, 315. The Justices who dissented in *Pfizer* also concluded that Section 4 was "enacted to protect American consumers." *Id.* at 321.

The understanding that consumers may recover for their losses runs throughout the Court's decisions construing Section 4. See, *e.g.*, *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), which holds that attorney fee schedules fixing prices to be charged to consumers of legal services are unlawful. The Court stated that "in terms of restraining competition and harming consumers like petitioners the price-fixing activities

found here are unusually damaging" (*id.* at 782). See also *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) (noting that "consumers" are among the persons entitled to sue for treble damages); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 489-490 (1968) (pointing out that a purchaser who "absorbs the loss" resulting from an antitrust overcharge may sue for treble damages and citing the *Chattanooga* case for the proposition that an overcharge causes injury to the purchaser's "property").[15]

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[15] Many lower federal courts also have concluded that overcharged consumers may recover. See, *e.g.*, *Cleary* v. *Chalk,* 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), cert. denied, 416 U.S. 938 (1974); *Bravman* v. *Bassett Furniture Industries, Inc.,* 552 F.2d 90, 98-99 & n.23 (3d Cir.), cert. denied, 434 U.S. 823 (1977); *Theophil* v. *Sheller-Globe Corp.,* 446 F. Supp. 131, 135 (E.D.N.Y. 1978), appeal dismissed, No. 78-7389 (2d Cir. Jan. 3, 1979); *DeGregorio* v. *Segal,* 443 F. Supp. 1257, 1263 (E.D. Pa. 1978); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation,* 1977-1 Trade Cas. ¶ 61,434 (D.D.C. May 17, 1977); *Lohse* v. *Dairy Comm'n,* 1977-2 Trade Cas. ¶ 61,805 (D.Nev. Dec. 21, 1977); *Lefrak* v. *Arabian Am. Oil Co.,* 405 F. Supp. 597, 598 (E.D.N.Y. 1975).

Four district court decisions have excluded retail nonbusiness consumers from the scope of Section 4, although three were issued on the same day by a single judge. See *Ware* v. *Trailer Mart, Inc.,* No. C 74-394 (N.D. Ohio May 31, 1978), appeal docketed, No. 78-3383 (6th Cir. July 20, 1978); *Weinberg* v. *Federated Department Stores, Inc.,* 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez* v. *E. & J. Gallo Winery Co.,* 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith* v. *Toyota Motor Sales U.S.A., Inc.,* No. 75-0727 (N.D. Cal. Jan. 11, 1977), appeals in all three cases docketed, Nos. 77-1724, 1725, 1845, 1850, 1851, 1852 (9th Cir.).

2. The court of appeals mistakenly concluded that this Court's decision in *Hawaii* v. *Standard Oil Co.*, *supra*, supported its restrictive interpretation of Section 4 (Pet. App. A-22 to A-23). In *Hawaii* the plaintiff State sought to recover treble damages both in its capacity as a purchaser and as *parens patriae* for its residents. The *parens patriae* claim rested on alleged injuries to the general economy of the State (405 U.S. at 255). This Court declined to create a right of action for injuries to the general economy, reasoning that such claims are not based on property or business losses. In limiting the State's recovery to injuries to its "commercial interests or enterprises," however, the Court did not hold that "business" injuries alone are compensable. The Court used the term "commercial" to refer to the interest of the State as a buyer, seller, or competitor. It expressly affirmed that where a state seeks recovery for injury incurred "as a consumer in the marketplace, through a 'payment of money wrongfully induced,' *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), damages are established by the amount of the overcharge" (405 U.S. at 263 n.14). See also *id.* at 264-265.

In other words, the Court's decision in *Hawaii* does not restrict Section 4 to injuries inflicted on businesses. The case stands for the proposition that injuries to "business or property" must be proximate and concrete. See generally 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 334b at 163 (1978). Injuries to the general economy, speculative injuries, injuries remote

from the antitrust violation, and injuries that do not flow from a restriction of competition are outside the scope of Section 4. Direct injuries to a consumer's pocketbook, however, are compensable. 2 P. Areeda & D. Turner, *Antitrust Law*, *supra*, at ¶ 337b, p. 184. And even if *Hawaii* holds that the injury in question must be "commercial," that means no more than that the injury must take place in the course of commercial economic transactions. The transactions in this case surely meet that criterion: hearing aids are bought and sold as part of the commercial economy. Reiter and the members of her class participated in commercial transactions when they bought hearing aids, and they allege that they suffered economic injury in the course of this commerce.[16] That should be enough.

This Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), also does not support the decision of the court of appeals. *Illinois Brick* held that direct purchasers of commodities are "injured to the full extent of the overcharge paid by them," and that it is unnecessary to attempt to "apportion the overcharge among all [indirect purchasers] that may have absorbed a part of it." 431 U.S. at 746. That result was appropriate, the Court concluded, because vigorous litigation by the direct victim of the antitrust

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[16] Our brief as amicus curiae in *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, pet. for cert. pending, No. 78-486, discusses our conclusion that Section 4 pertains only to injuries that take place in economic transactions. We have furnished copies of that brief to counsel for the parties in this case.

violation would deter violations, and because the direct victim suffers "at least some and often most of the overcharge." *Ibid.* In the present case, petitioner (and her class) are the purchasers injured directly by the retail price maintenance scheme. Under the Court's analysis in *Illinois Brick*, they are the appropriate parties to seek redress for the overcharge.[17]

[17] The court of appeals' reliance on *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973) (Pet. App. A-24 to A-25); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973) (Pet. App. A-25); and *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F. 2d 1172 (5th Cir. 1976) (Pet. App. A-25 to A-26), is unwarranted.

Circle Floor holds that compensable injuries must stem from conduct that violates the antitrust laws. That decision anticipated the holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, that Section 4 allows recovery only for injury "that flows from that which makes the defendants' acts unlawful" (429 U.S. at 489). *Circle Floor* does not suggest that overcharges on goods bought for personal rather than business use are not compensable.

In re Multidistrict Vehicle Air Pollution holds that states may not seek damages for general injuries to buildings and other government property and interests, reasoning that such claims are akin to the claims disapproved in *Hawaii* v. *Standard Oil Co., supra.* The court noted that the injuries were unrelated to commercial transactions, but it did not hold that overcharges inflicted directly on retail purchasers are beyond the scope of Section 4.

Mobile Towing Co. holds that employees denied work opportunities and unions weakened in their ability to represent employees as a result of antitrust violations suffer commercial injury that may be redressed under Section 4. That opinion does not hold that retail consumers lack a protectable interest.

D. Consumer Suits Help To Deter Violations Of The Antitrust Laws

1. Private actions under Section 4 "deter violators and deprive them of 'the fruits of their illegality.'" *Pfizer Inc.* v. *Government of India, supra*, 434 U.S. at 314. See also *Illinois Brick Co.* v. *Illinois, supra*, 431 U.S. at 746; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 485-486. Injured parties suing for treble damages serve as "private attorneys general," whose activities help bring about compliance with the antitrust laws. *Hawaii* v. *Standard Oil Co., supra*, 405 U.S. at 262.

Unless consumers may recover for their losses, the deterrence of retail price fixing conspiracies will be minimal. Consumers are the only direct victims of retail price fixing conspiracies. Considering the importance to the national economy of controlling inflationary pressures in consumer retail markets, a decrease in effective deterrence would be regrettable.[18] See *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 782. The Antitrust Division of the Department of Justice can bring only 60 to 100 suits annually against antitrust violations of all kinds. Private treble damages actions are an essential supplement to the Division's enforcement efforts. In fiscal year 1978 private parties commenced 1,435 antitrust suits, while the United States instituted only 72. *1978 An-*

[18] The importance of vigorous competition in consumer retail markets can scarcely be overstated. Retail nonbusiness consumers purchase more than $1.2 trillion in goods and services annually. See *1978 Economic Report of the President* 257, Table B-1.

nual Report of the Director, Administrative Office of the United States Courts 78, Table 28. Private actions to curtail retail price fixing conspiracies are especially important, because such conspiracies often occur on a relatively small scale. The limited enforcement resources of the federal government necessarily must be concentrated on violations involving substantial amounts of commerce. Effective deterrence of local retail price fixing agreements cannot be achieved without consumer litigation.[19]

2. The court of appeals concluded that the "deterrent impact of such suits * * * does not outweigh their potentially ruinous effect on American business" (Pet. App. A-29). It asserted that small business firms are particularly susceptible to "nonmeritorious" class actions, and that class litigation would injure such firms and thus foster "oligopolistic" market conditions (*ibid.*).

The court of appeals' view of the "ruinous effect" of consumer suits is at odds with the congressional judgment. Congress intended to give consumers remedies both to allow them to recover for their losses and to deter potential violators. The judicial branch may not substitute its views for those of Congress concerning the appropriate way to enforce the antitrust laws.

[19] See D. Turner & C. Kaysen, *Antitrust Policy: An Economic and Legal Analysis* 257 (1959): "[P]rivate suits * * * may be the most effective way of policing the multitude of comparatively local * * * violations that will tend to escape the glance of federal enforcement authorities or that, even if noticed, do not merit the expenditure of limited enforcement resources."

See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); see also *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 38-40.

The court of appeals' view of the effect of consumer suits, moreover, is incorrect. The contention that consumer antitrust actions generally are "meritless" is difficult to accept; it entails the proposition that consumer suits such as *Goldfarb* v. *Virginia State Bar*, *supra*, do not result in substantial public benefits. The proper remedy for truly non-meritorious antitrust litigation is summary disposition in favor of the defendants. See, *e.g.*, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-290 (1968) (summary judgment for a defendant in an antitrust action is appropriate where the plaintiff failed to adduce "any significant probative evidence tending to support the complaint"). Cases should be decided on their merits; there is no justification for precluding all consumer complaints on the theory that the defendants may be entitled to judgment in some or even most of them. And if the objection is that class actions are unmanageable, then the maximum response should be not to certify unmanageable classes; there is no reason to bar consumer litgation altogether.[20]

[20] While the court of appeals was concerned about the administrative burdens that may result from class litigation (Pet. App. A-28 to A-30), this Court has referred with approval to antitrust class actions on behalf of "consumer-citizens." See *Hawaii* v. *Standard Oil Co.*, *supra*, 405 U.S. at 266:

> Congress has given private citizens rights of action for * * * damages for antitrust violations * * *. Rule 23 of

The conjecture of the court of appeals (Pet. App. A-28 to A-29) that small businesses are particularly susceptible to baleful consequences of non-meritorious class complaints is unsupported. The court did not explain why antitrust plaintiffs would sue small business defendants. Antitrust plaintiffs ordinarily sue defendants with "deep pockets"—defendants that have the money to pay substantial judgments. There

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the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources * * *.

Fed. R. Civ. P. 23(b)(3) vests the district courts with discretion to terminate unmanageable class proceedings in which common questions do not predominate, and Rule 23(c) allows courts to confine class actions to limited issues or subclasses of plaintiffs if proceedings would otherwise be unmanageable. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 179-186 (1974) (Douglas, J., dissenting in part). No decision has been rendered on the propriety of maintaining the present case as a class action.

The court of appeals' belief that class actions entail inefficient use of judicial time (Pet. App. A-28) has been the subject of academic study. One recent analysis, which involved extensive study of the work of two large federal districts, indicated that "[c]lass actions do not appear to consume inordinately large amounts of judicial time, and have in fact been at least as efficient as nonclass actions—if not more so—in terms of judicial time expended per dollars of recovery effected and per dollar's worth of injury recompensed." Bernstein, *Judicial Economy and Class Actions*, 7 J. Legal Studies 349, 369 (1978). The study found that in one district class actions were 1.3 times as efficient as nonclass actions and in another district were 4.74 times as efficient. These data raise serious doubts about the correctness of the court of appeals' belief.

is thus no reason to conclude that consumer class actions impose undue burdens on small business firms.[21]

E. The Decision Of The Court Of Appeals Would Nullify The *Parens Patriae* Title Of The Hart-Scott-Rodino Antitrust Improvements Act Of 1976

The court of appeals apparently believed that its decision would not interfere with the ability of state attorneys general to prosecute consumer antitrust claims under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h (Pet. App. A-29). The court of appeals is wrong. The court held that overcharged consumers are not injured in their "property" within the meaning of Section 4 of the Clayton Act. That interpretation would foreclose consumer claims under the Antitrust Improvements Act.

The *parens patriae* provision of the Antitrust Improvements Act provides:

---

[21] The court of appeals did not refer to a statistical study or any other authority suggesting that small businesses are likely to be named as defendants in antitrust class actions. There is, of course, very little to be gained by suing defendants of limited means in treble damages class actions, and few plaintiffs would undertake the expense and burden of antitrust litigation in such circumstances. Moreover, attempts to bring antitrust actions *against* a class of small business defendants are not likely to be availing. Defendant class actions easily can be defeated by defendants "opting out" of the class. See Fed. R. Civ. P. 23(c). See also *Appleton Electric Corp.* v. *Advance United Expressways*, 494 F. 2d 126, 140 (7th Cir. 1974); *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226, 238-239 (9th Cir. 1975) (Dunniway, J., concurring).

> Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State * * * to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title.

15 U.S.C. 15c(a)(1). Consumer recovery under this provision, like Section 4 of the Clayton Act, must be based on "property" injuries. As the Court concluded in *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14, "Congress made clear * * * that this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under Section 4." *Parens patriae* suits are " 'an alternative means * * * for the vindication of existing substantive claims.' " *Ibid.* The Eighth Circuit has held that consumers have no "existing substantive claims;" it necessarily follows that state attorneys general cannot sue in their behalf. Moreover, the Antitrust Improvements Act authorizes *parens patriae* actions only on behalf of "natural persons." 15 U.S.C. 15c(a)(1). Congress intended to provide an effective mechanism to enforce the Section 4 claims of "consumers," as distinguished from those of businesses. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 3-8 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 5-10, 39-42 (1976). Because consumers are the only

persons whose claims may be asserted in *parens patriae* proceedings, and because the decision below strips them of their substantive rights of action, it vitiates the entire *parens patriae* statute.

While it is quite true that Congress' beliefs when enacting the Antitrust Improvements Act are not "dispositive" in construing the scope of Section 4 of the Clayton Act, and subsequent legislative developments "cannot serve to change the legislative intent of Congress" in enacting Section 4 (*Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14), the passage of the Antitrust Improvements Act underscores the consistent position of Congress that consumers have remedies under Section 4.[22] That understanding reinforces the original legislative purpose.[23] The course of legislation from 1890 to 1976 discloses a continuing congressional desire to grant consumers effective redress for antitrust injuries. In these circumstances, Congress' enactment of the Antitrust Im-

---

[22] In *Illinois Brick* this Court held that recognizing claims of indirect purchasers would conflict with the purposes of Section 4, and it concluded that statements of individual legislators occurring after the passage of Section 4 would not justify a departure from those purposes. Here, however, the foundation for the entire statute was that consumers have rights under Section 4. That premise is perfectly consistent with the views of Congress in 1890 and 1914. See pages 12-19, *supra*.

[23] See H.R. Rep. No. 94-499, *supra*, at 6: "Under Section 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action." Accord, S. Rep. No. 94-803, *supra*, at 39.

provements Act is an additional ground for holding that consumers may recover under Section 4. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958).[24]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[24] Pages 24-28 of our brief as amicus curiae in *Oscar Mayer & Co.* v. *Evans*, No. 78-275, cert. granted (Oct. 30, 1978), discuss at greater length the circumstances under which subsequent legislation and legislative history is valuable in the construction of a statute. We have furnished copies of that brief to counsel for the parties in this case.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

v.

SONOTONE CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OBJECTION OF RESPONDENTS TO UNTIMELY FILING OF BRIEF AMICUS CURIAE BY SOLICITOR GENERAL IN BEHALF OF THE UNITED STATES

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OBJECTION OF RESPONDENTS TO UNTIMELY FILING OF BRIEF AMICUS CURIAE BY SOLICITOR GENERAL IN BEHALF OF THE UNITED STATES

Respondents hereby object to the untimely filing of a printed *amicus curiae* brief in this matter by the Solicitor General in behalf of the United States, without leave of this Court.

Subdivisions (2) and (5) of Rule 42 of the Rules of this Court provide that a printed brief of an *amicus curiae* in cases before this Court must be presented within the time allowed for the filing of the brief of the parties supported. The printed *amicus curiae* brief filed by the Solicitor Gen-

eral in behalf of the United States in support of the position of the Petitioner was due on February 22, 1979, the date on which Petitioner's brief was filed with this Court. On February 27, 1979, five days beyond the due date, the Solicitor General of the United States filed its *amicus curiae* brief with this Court[1] and caused service thereof to be made upon the Respondents by mail.

Respondents object to the untimely filing of the printed *amicus curiae* brief filed by the Solicitor General in behalf of the United States, in that Rule 42 of this Court, and its pertinent subdivisions, calling for filing on a timely basis of printed briefs, apply to all parties, including the United States Government and its Solicitor General. Although an uncorrected typewritten version of the brief was filed with this Court by the Solicitor General of the United States on February 22, 1979, the Respondents had no way of anticipating what changes might occur in the editing and revision of the subject brief prior to final printing, filing and service.

In view of the untimely filing of the printed *amicus curiae* brief by the Solicitor General of the United States, without leave of Court, Respondents respectfully request

[1]The Solicitor General did file an uncorrected typewritten copy of the *amicus curiae* brief with this Court on February 22, 1979, and caused a copy thereof to be served on the Respondents by mail. The printed version of the brief varies in at least one important respect from that of the typewritten copy, in that the Solicitor General in the printed version of the brief has deleted references to an alleged study completed by the Department of Justice's Office for Improvement in the Administration of Justice entitled "Procedures to Allow Effective Small Business Access to Federal Justice" (February, 1979). See Footnote 21, typewritten and printed copies of the *amicus curiae* brief filed by the Solicitor General in behalf of the United States. In addition, there were numerous typographical changes in the two versions. The Solicitor General also makes reference at Footnotes 16 and 24 of the typewritten and printed versions of the *amicus curiae* brief to *amicus curiae* briefs which the Solicitor General has filed with the United States Supreme Court in other pending matters. Although these briefs were presumably available on February 22, 1979, the Solicitor General did not cause such briefs to be served upon Respondents until February 27, 1979.

that the filing thereof be disallowed and that this Court enter an appropriate order to that effect.

Respectfully submitted,

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IN THE

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October Term, 1978

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SONOTONE CORPORATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR PLAINTIFFS IN KENNDY SMITH v. TOYOTA MOTOR SALES U. S. A. AND FIVE RELATED CASES AND IN DONNA JEAN WEINBERGER v. FEDERATED DEPARTMENT STORES AND RELATED CASES AS AMICI CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

Plaintiffs in *Kennedy Smith v. Toyota Motor Sales U. S. A., Inc. and Five Related Cases*[1] and plaintiffs in *Donna Jean Weinberg v. Federated Department Stores and Related Cases*[2] hereby respectfully move for leave to file the attached brief as *amici curiae* in this case. The consent of attorney for petitioner has been obtained. The consent of attorneys for the respondent was requested and refused.

Movants' interest in this case arises from the fact that they are parties to cases which, like the case before the Court, involve the issue of whether consumers who purchased price-fixed goods for personal use and were overcharged may sue for injury to their "property" under Section 4 of the Clayton Act. The cases of movants have been argued before the Ninth Circuit Court of Appeals, and the Ninth Circuit has entered orders deferring decision of those appeals pending resolution of this case.

The cases brought by movants follow federal price fixing investigations, and federal price fixing suits. A decision in this case, where no such investigation, federal complaint or indictment is present, regarding the right of a consumer to sue would govern the cases of the movants and other cases which follow, and supplement, federal price fixing suits.[3] Movants believe that their brief will contain

1. United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1849, 77-1850, 77-1851, 77-1852, 77-1724, and 77-1725. The named plaintiffs are: Kennedy Smith, Barry S. Kohn, Jonathan Kilburn Carr, Richard P. Gardner, Charleen Pellar, Marla Bussard, Marc D. Goldberg, Robert J. Berman, Debra Berman and Alan Blau.

2. United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1547, 77-1548, 77-1549, 77-1550, and 77-1551. The named plaintiffs are: Donna Jean Weinberg, Eleanor Eisenberg, Sandra A. Musser, June Morgan, David M. Kimmel.

3. The *Reiter* case was brought subsequent to FTC complaints in the hearing aid industry alleging anticompetitive practices, other than price fixing. See CCH Trade Regulation Reporter

a more complete argument regarding the complementary role of government and consumer actions in the federal antitrust enforcement scheme than the briefs which will be filed by the parties.

Respectfully submitted,

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3. (Cont'd.)
¶ 20,326; ¶ 20,382; ¶ 20,605 (consent decrees). Unlike the cases brought by amici, it does not follow a Justice Department or FTC action alleging price fixing.

INTEREST OF AMICI CURIAE.

Each *amicus* is a non-business consumer. Each has brought a treble damage action under 15 U. S. C. § 15 against firms which were the subjects of preceding price-fixing suits by the Federal government. The defendants in these actions moved to dismiss on the grounds that the plaintiffs lacked standing because as retail non-business consumers, they had not been injured in their "business or property." The motions were granted in *Weinberg v. Federated Department Stores*, 426 F. Supp. 880 (N. D. Cal. 1977) and *Kennedy Smith v. Toyota Motor Sales*, 1977-1 CCH Trade Cases ¶ 61,251 (N. D. Cal. 1977). Appeals from those dismissals were argued before the Ninth Circuit and orders have been entered staying disposition of the appeals pending decision in this case.

This Court's construction of the phrase "business or property" in Section 4 of the Clayton Act will govern the decision in the cases brought by *amici*.

SUMMARY OF ARGUMENT.

For seventy years, courts have followed Justice Holmes' construction of the "business or property" requirement in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906): "A person whose property is diminished by payment of money wrongfully induced is injured in his business or property." Consumers are injured in this manner by overcharges from price-fixing as surely as businesses. Indeed, the rationale of this Court's rejection of *parens patriae* actions in *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), was the risk that defendants would be liable for duplicative damages, to individuals and to the "general economy" of the state. *Id.* at 264.

The Eighth Circuit's reversal of settled law by inserting a requirement of injury to *business* consumers is unjustified by legislative history or antitrust policy.

The antitrust bill originally introduced by Senator Sherman provided a cause of action to "any person . . . injured or damnified" by an antitrust violation; it was to "give a private remedy to every person injured." Remarks of Senator Sherman, 21 Cong. Rec. 2563 (1890). As rewritten by the Senate Judiciary Committee, and ultimately adopted, the act allowed damages to "any person injured in his business or property". This alteration, however, was not intended to exclude consumers. Senator Edmunds, Chairman of the Committee, "repeated that this section was intended by the Committee on the Judiciary to allow anybody who wishes, to sue." 21 Cong. Rec. 3149 (1890). While both before and after the Judiciary Committee's revisions, several senators questioned whether, in view of the costs and procedural difficulties of federal litigation, individuals would have *practical* access to the damage remedies granted by the bill, all believed that consumers were accorded the *legal* option of seeking treble

damages. The cause of action granted by § 7 of the Sherman Act was reenacted virtually verbatim in § 4 of the Clayton Act, and the relevant legislative history shows that the reenactment was intended to be of identical scope.

The same concerns that prompted the Court to grant standing to foreign governments in *Pfizer, Inc. v. Government of India*, 434 U. S. 308 (1978) dictate all the more that it honor Congress' intent to grant all consumers a cause of action. To adopt the Eighth Circuit's "business purchaser" rule would arbitrarily deprive most individuals of a right to compensation for illegal overcharges, and at the same time allow antitrust violators to escape full responsibility for their actions. The availability of civil and criminal actions by the government would not heal this gaping breach. Recent empirical work indicates that most of the deterrent effect of Government antitrust prosecutions can be traced to the private actions brought in their wake.

Price fixing cases currently present three principal issues: whether the defendants illegally conspired to fix prices, whether the plaintiff was overcharged, and the amount of this overcharge. The requirement of sorting "business" from "non-business" purchases would add a fourth issue to becloud litigation, particularly in cases of mixed use by a single purchaser. This needless complication of antitrust law further counsels against adoption of a novel and unjustified doctrine. See, *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 732, 737 (1977).

As this Court observed in *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 486 n. 10 (1977) the legislative history of the treble damage remedy indicates "that it was conceived of primarily for as a remedy for 'the people of the United States as individuals', especially consumers." The Court should not frustrate that Congressionally intended remedy by upholding a construction of "business or property", more narrow than the ordinary meaning of "property".

ARGUMENT.

I. For Over Seventy Years, Courts Have Interpreted Overcharges to Consumers of Price-Fixed Goods to Be Injuries in "Business or Property".

Examination of the holding of the Eighth Circuit must begin by placing that decision in perspective. The determination that only business entities may bring suit to recover price fixing overcharges strips non-business consumers of a cause of action which courts have recognized for over seventy years.

The first authoritative exposition of the meaning of the terms "business or property" was set forth by Justice Holmes in *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390 (1906). In that case, the City of Atlanta, which bought pipe for its waterworks, brought suit against pipe manufacturers who had engaged in price fixing to recover three times the difference between the price it paid for the pipe and the price which would have prevailed absent the conspiracy. The verdict in the city's favor was appealed to this Court. In their brief, the defendants argued, *inter alia,* that the City of Atlanta, as a consumer of pipe, had no standing to bring suit under the Sherman Act, whose purpose was to protect competition. While competitive businesses might have a cause of action against antitrust violators, it was argued:

> "[T]o extend the operation of the Act so as to give a right of action under the Seventh Section thereof, to every consumer seeking to recover back as excessive a part of the price paid for goods . . . . would include a class of actions not contemplated by Congress, and not necessary to insure competition in interstate trade." Appellants' Brief in *Chattanooga Foundry & Pipe Works v. City of Atlanta, supra,* pp. 8-11.

Justice Holmes gave short shrift to the argument, declaring:

> "The city was a person within the meaning of § 7 . . . . *It was injured in its property,* at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. *A person whose property is diminished by payment of money wrongfully induced is injured in his property.*" 203 U. S. at 396.[4] (Emphasis added).

Although the City of Atlanta bought its price-fixed pipe for use in waterworks whose services were sold to citizens, Justice Holmes disavowed reliance on that fact. As Professor Sullivan notes, the case's "rationale clearly covers the property of an ultimate consumer as well as that of a business firm." L. Sullivan, *Antitrust* 771 n. 3 (1977).

Any ambiguity on this point was set to rest by the holding forty years later in *Georgia v. Evans,* 316 U. S. 159 (1942). There, the State of Georgia was permitted to bring an action in its own name charging injury from a price fixing conspiracy in the market for asphalt which the state purchased annually for use in the construction of public roads. The case contains no intimation that the asphalt was used in entrepreneurial activities. *Cf., Pfizer, Inc. v. Government of India,* 434 U. S. 308 (1978) (Indian, Iranian, and Philippine governments had standing to sue for overcharges in purchase of antibiotics). Similarly, in

4. In *Thomsen v. Cayser,* 243 U. S. 66, 88 (1917) the Court extended this holding to overcharges for services, stating "The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury."

Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975), this Court upheld a finding of liability in a class action for damages brought by a retail home purchaser against a state bar association.[5]

In *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), this Court held that Hawaii could not sustain a *parens patriae* suit for injuries to its general economy from a price fixing conspiracy in oil, since such damage did not constitute injury in business or property as contemplated by the statute. Taken alone, the Court's reasoning that "business or property" refers to "commercial interests or enterprises", *id.* at 264, might appear to undermine the argument for consumer standing; but in context the holding buttresses the case for standing. The Court held that the state may vindicate "commercial interests" by bringing suit "in its proprietary capacity" *id.* 262, "where the injury to the state occurs in its capacity as a consumer in the marketplace". *Id.* at n. 14. Consumption "in the marketplace" is a "commercial interest" for purposes of the business or property test, and it is an activity that may be undertaken by private consumers as well as states.[6]

5. Dicta in a number of recent cases also indicate that this Court views consumers as possessing a cause of action under the antitrust law. See, *Pfizer Inc. v. Government of India*, 434 U. S. 308, 313-314 (1978) ("Clearly, therefore, Congress did not intend to make the treble damage remedy available only to consumers in our own country"); *id.* at 324, 325 (Burger, C. J., dissenting) (citing "the focus . . . on protecting *domestic* consumers", Sherman Act is "primarily a remedy for American consumers"); *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 486 n. 10 (1977) (Sherman Act is a remedy "for the people of the United States as individuals, especially consumers"); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481, 491 (1968) (reaffirming "the general principle that the victim of an overcharge is damaged within the meaning of Section 4 to the extent of that overcharge").

6. See, *Goldfarb v. Virginia State Bar Assn., supra*, 421 U. S. at 786-88 ("examination of a land title is a service; the exchange of such a service for [a consumer's] money is commerce in the most common usage of that word").

Indeed, it was "the problem of double recovery inherent in allowing for damages both to the *economic interests of individuals* and the quasi-sovereign interest of the state" *id.* at 264 (emphasis supplied) that provided the impetus for the Court's disapproval of *parens patriae* actions. The Court stated that under appropriate circumstances, a state could "bring a class action on behalf of some *or all* of its consumer citizens." *Id.* at 266. (Emphasis supplied). The Court reiterated the holding of *Chattanooga Foundry* that the Sherman Act permits recovery for "payment of money wrongfully induced": "damages are established by the amount of the overcharge". *Id.* at 262 n. 14.

Development in the lower courts followed a similar course. Before 1977, the few cases that found it necessary to consider explicitly the "business or property" language interpreted it under *Chattanooga* to allow suit by any individual overcharged by a price fixing conspiracy. *E.g.*, *Cleary v. Chalk*, 488 F. 2d 1315, 1319 n. 17 (D. C. Cir. 1973), *cert. denied* 416 U. S. 938 (1974). See, *Bravman v. Bassett Furniture*, 552 F. 2d 90, 98-99 and n. 23 (3d Cir.) *cert. denied* 434 U. S. 823 (1977) ("The right of consumers to challenge price fixing conspiracies is well established").[7] With the emergence of class actions under Rule 23, F. R. Civ. P., courts evidenced tacit approval of consumer standing through the widespread certification of consumer classes.[8]

7. Cases which invoked the "commercial interest" test did so to bar claims for remote injuries unrelated to monetary overcharges suffered by consumers as a result of their purchases. *E.g.*, *In re Multidistrict Vehicle Pollution*, 481 F. 2d 122 (9th Cir. 1973) (injury from environmental pollution); *Ragar v. T. J. Raney & Sons*, 388 F. Supp. 1184, 1187 (E. D. Ark.) *aff'd*, 521 F. 2d 795 (8th Cir. 1975) *per curiam* (taxpayer suit for increase to bond interest rates paid by municipality).

8. See, *e.g.*, *In Re Independent Gasoline Antitrust Cases*, 1978-1 CCH Trade Cases ¶ 62,085 (D. Md. 1978); *Axelrod v. Saks*

The term "business or property" does not define who may sue. It instead defines, as one commentator has pointed out, the "content of the requisite injuries. Whereas injury to such noneconomic values as aesthetics, conservation and recreation has been held sufficient to support standing in a nonantitrust context, the Supreme Court has squarely held that Section 4 is concerned exclusively with 'commercial injury'" Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N. Y. U. L. Rev. 371, 397 (1976)

8. (Cont'd.)
& Co., 1978-1 CCH Trade Cases ¶ 61,819 (E. D. Pa. 1978); *Kromer v. Saks & Co.*, 1977-2 CCH Trade Cases ¶ 61,771 (S. D. N. Y. 1978); *Chevalier v. Baird Savings Assoc.*, 72 F. R. D. 140 (E. D. Pa. 1976); *In Re Arizona Bakery Products Litigation*, 1976-2 CCH Trade Cases ¶ 61,120 (D. Ariz. 1976); *In Re Arizona Dairy Products Litigation*, 1975-2 CCH Trade Cases ¶ 60,395 (D. Ariz. 1975); *Dennis v. Saks & Co.*, 1975-2 CCH Trade Cases ¶ 60,396 (S. D. N. Y. 1975); *Knowles v. Tuscaloosa Real Estate Board*, 1975-2 CCH Trade Cases ¶ 60,501 (N. D. Ala. 1975); *Lafrak v. Arabian American Oil Co.*, 405 F. Supp. 597 (E. D. N. Y. 1975); *Link v. Mercedes-Benz*, 1975-2 CCH Trade Cases ¶ 60,534 (E. D. Pa. 1975), *app. dism'd.*, 550 F. 2d 860 (3d Cir. 1977) (*en banc*) *cert. den.*, 431 U. S. 933 (1977); *Hemley v. American Honda Motor Co.*, 1975-2 CCH Trade Cases ¶ 60,457 (S. D. N. Y. 1975); *Hill v. A-T-O, Inc.*, 1975-1 CCH Trade Cases ¶ 60,235 (E. D. N. Y. 1975); *Sommers v. Abraham Lincoln Savings & Loan Assn.*, 66 F. R. D. 581 (E. D. Pa. 1975); *Weit v. Continental Illinois Nat'l Bank*, 60 F. R. D. 5 (N. D. Ill. 1973), *app. dism'd.*, 535 F. 2d 1010 (7th Cir. 1976); *Foster v. Maryland State Savings & Loan Assoc.*, 1974-2 CCH Trade Cases ¶ 75,317 (D. D. C. 1974); *Hill v. Art Rice Realty Co.*, 1974-2 CCH Trade Cases ¶ 75,364 (N. D. Ala. 1974); *P. D. Q. Inc. of Miami v. Nissan Motor Corp.*, 61 F. R. D. 372 (S. D. Fla. 1973); *Forbes v. Greater Minneapolis Area Real Estate Board*, 61 F. R. D. 416 (D. Minn. 1973); *In Re Ampicillin Antitrust Litigation*, 55 F. R. D. 269 (D. D. C. 1972); *Marks v. San Francisco Real Estate Board*, 1972 CCH Trade Cases ¶ 74,130 and ¶ 74,242 (N. D. Cal. 1972), *class decertified on other grounds*, 69 F. R. D. 353 (N. D. Cal. 1975), *appeal dism'd. and rem.*, 1977-1 CCH Trade Cases ¶ 61,275 (9th Cir. 1977); *State of West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079 (2d Cir. 1971), *affg.* 314 F. Supp. 710 (S. D. N. Y. 1970); *Cusick v. N. V. Nederlandsche, etc.*, 317 F. Supp. 1022 (E. D. Pa 1970); *In Re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 333 F. Supp. 278, 285 (S. D. N. Y. 1971); *Contract Buyers League v. F & F Investment*, 48 F. R. D. 7 (N. D. Ill. 1969).

(Footnotes omitted). Consumers, like businesses, may suffer "economic" or "commercial" injury from their transactions in the marketplace. As Professor Sullivan noted in 1977, while the phrase "business or property" "has not been the subject of artful elaboration, [b]y and large, any injury to financial interests, including those to a consumer which must pay more for a purchase because of a violation, have been held to be compensable." L. Sullivan, *supra* at 771.

Against this background, the case before the Court, and the trilogy of cases from the Northern District of California awaiting decision before the Ninth Circuit,[9] are radical departures from a settled understanding of the antitrust laws.[10] These departures have been rejected by a phalanx of recent, well-reasoned authorities, both state and federal: *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E. D. N. Y. 1978); *DeGregorio v. Segal*, 443 F. Supp. 1257, 1260-61 (E. D. Pa. 1978); *In re Petroleum Products Antitrust Marketing Litigation*, 1977-2 CCH Trade Cases ¶ 61,639 (C. D. Cal. 1977); *In re Ampicillin Antitrust Litigation;* 1977-1 CCH Trade Cases ¶ 61,434 (D. D. C. 1977); *Lohse v. Dairy Commission of Nevada*, 1977-2 CCH Trade Cases ¶ 61,805 (D. Nev. 1977); *New Jersey Chiropractic Society v. Radiological Society of New Jersey*, 1978-1 CCH Trade Cases ¶ 61,894 (N. J. Super. 1978); *Rosack v. Volvo of America Corp.*, 1977-1 CCH Trade

9. *Weinberg v. Federated Department Stores*, 426 F. Supp. 880 (N. D. Cal. 1977); *Kennedy Smith v. Toyota Motor Sales*, 1977-1 CCH Trade Cases ¶ 61,251 (N. D. Cal. 1977); *Gutierrez v. E & J Gallo Winery Co.*, 425 F. Supp. 1221 (N. D. Cal. 1977).

10. See, American Bar Association, *Antitrust Law Developments* (1975) at 261-2, "To recover damages a 'person injured' by an antitrust violation must assert injury inflicted upon 'business or property.' *Chattanooga Foundry & Pipe Works v. City of Atlanta* [203 U. S. 390 (1906)] established that '[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property.'"

Cases ¶ 61,395 (Calif. Super. 1977). The Eighth Circuit's "business purchaser" test [11] is contrary to decisions of this Court discussed above, and is without justification in statutory language, legislative history, or considerations of policy.

II. The Language and History of the Antitrust Laws Bespeak an Intent to Allow Suits by Consumers Overcharged by Price Fixers.

As this Court recently observed, "The starting point in every case involving the construction of a statute is the language of the statute itself". *International Brotherhood of Teamsters v. Daniel*, — U. S. —, 47 USLW 4135, 4136 (1979). The language at issue here is that of Section 4 of the Clayton Act, derived directly from Section 7 of the Sherman Act. It provides treble damages to:

> "any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws of the United States."

Each of the elements of this provision extends to the consumers who seek to bring suit here.

A. Consumers Are "Persons".

Private individuals fall naturally within the ambit of the term "person". This Court reiterated the breadth of this language just last term:

> "'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328; cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 138-139, 88 S. Ct. 1981, 1984, 20 L. Ed. 2d 982. And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning."

Pfizer, Inc. v. Govt. of India, 343 U. S. 308, 312 (1978). See, *United States v. Cooper Corp.*, 312 U. S. 600, 606 (1941) (the term "persons" includes "natural and artificial persons, that is, individuals and corporations.").

B. Consumers Overcharged by Price Fixers Are Injured "By Reason Of" Antitrust Violations.

Agreements or combinations to fix prices are *per se* illegal and the purpose of such agreements ordinarily is to increase the price charged to buyers. When a consumer buys a product directly from a price fixer at an increased price, that consumer is injured by reason of the violation and suffers "injury of the type the antitrust laws were intended to prevent . . . the type of loss that the claimed violations would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 489 (1977).

C. Consumers Overcharged by Price Fixers Are Injured in Their "Business or Property".

As set forth above, since the *Chattanooga Foundry* case, courts have adopted the position that "A person whose property is diminished by a payment of money wrongfully induced is injured in his property . . . . The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff." 203 U. S. 390, 396-7. The language of the statute gives no intimation that only businesses may be so injured; the

11. In addition to the decision under review, which was denied *en banc* rehearing by a vote of four to three, the Eighth Circuit followed the *Reiter* holding in *Beckers v. International Snowmobile Indust. Assn.* 1978-2 CCH Trade Cases ¶ 62,191 (8th Cir. 1978).

statute speaks in the alternative of "business *or* property". See, *e.g., Hecht v. Pro-Football, Inc.*, 570 F. 2d 982, 993, n. 47 (D. C. Cir. 1977) (to recover under § 4 plaintiffs must prove "injury *either* to their business *or* to their property") (emphasis in original). As Professor Forkosch observes:

> "If the individual who was granted treble damages was meant to be solely the producing competitor, why does Section 7 [of the Sherman Act] speak of injury to one's business or property? 'Business,' it is true, refers to the entrepreneur and disregards the consumer *per se*. But property is not limited to the entrepreneur—it embraces . . . any loss of money through illegal overcharges, or price increases." M. Forkosch, *Antitrust and the Consumer (Enforcement)* (1956) 148.

Contrary to the apparent meaning of the statutory language, the Eighth Circuit majority in *Reiter* concluded that the legislative history of the Sherman and Clayton Acts compels the exclusion of consumers from treble damage actions. The Court of Appeals' conclusion flies in the face of the legislative history of the treble damage remedy, which indicates "that it was conceived of primarily as a remedy for 'the people of the United States as individuals' especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 426 U. S. at 486 n. 10, *quoted with approval, Pfizer, Inc. v. Govt. of India, supra,* 434 U. S. at 325 (Burger, J. dissenting).

1. The Legislative History of the Sherman Act Supports Consumer Standing.

The current provision for treble damages was first codified in § 7 of the Sherman Antitrust Act of 1890.

Reiter v. Sonotone Corp., 579 F. 2d 1077, 1079 (8th Cir. 1978). Debate on that provision centered not on whether the bill gave consumers the legal right to bring suit—that was assumed—but rather whether the inducement provided to these "private attorneys-general" would be adequate as a practical matter to enable the victims of monopolization to recover their damages.

a. Senator Sherman's Initial Bill Provided for Consumer Actions.

The bill drafted by Senator Sherman allowed recovery of "twice of the amount of damages sustained and costs of suit" together with a "reasonable attorney's fee" by "any person . . . injured or damnified" by an illegal combination or trust.[12]

The object of the section, according to Senator Sherman was "to give to private parties a remedy for personal injury caused by" an illegal combination. 21 Cong. Rec. 2456 (1890). In response to Senator Hoar's queries as to whether the bill's purpose was "to give private citizens who are injured by these combinations or monopolies for the

12. Following inaction on his original bill by the Fifteenth Congress, Sherman reintroduced it as S. 1 on December 4, 1889. Between this date and the Senate debate, the Bill was twice referred for redrafting to the Senate Committee on Finance, of which Sherman was the most influential member. The Senate debate lasted from March 21, 1890 through March 27, 1890. See M. Forkosch, *supra* at pp. 45-124.

As of March 18, 1890, the precursor to Section 7 read as follows:

> "Sec. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee." 21 Cong. Rec. 2600 (1890).

advancement of costs . . . a civil remedy in the courts", Senator Sherman affirmed: "Certainly . . . . The second section gives a private remedy to every person injured." 21 Cong. Rec. 2563 (1890).

A number of Senators, however, were skeptical of the consumers' practical ability to exercise their legally granted cause of action, in view of the expense and inconvenience of resort to the federal courts.

For example, Senator George complained early in the debates that:

> "*The right of action against the persons in the combination is given to the party damnified.* Who is this party injured, when, as proscribed in the bill, there has been an advance in the price of the combination? . . . . *The consumer is the party 'damnified or injured'* . . . .
>
> "Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination. It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be—though in the aggregate large, indeed—so small as not to justify the expense and trouble of a suit in a distant court." 21 Cong. Rec. 1767-68 (1890).

More sardonically, Senator Hiscock commented on the double damage provision:

> "Now then, let us look at the only remedy that the bill affords to an oppressed people . . . . A person sues the corporation or the combination or party to the combination. The combination is in twine, we will say, but the man who is injured is in Minnesota, and he is invited by this bill to travel to New York, . . . and commence his action in the circuit court of the United States and recover twice the damages that he has sustained . . . . [T]he people who are to suffer the damages are those who are distributed all over this broad land, the consumers of the article, the consumers of the merchandise, buying perhaps a hundred dollars' worth and damaged possibly $10 and they have the right to follow this combination or a party to wherever he is domiciled and recover twice the amount of damages they have sustained!
>
> Seriously Mr. President, it is a fearful attack upon trusts!" 21 Cong. Rec. 2571 (1890).

A similar refrain recurred in the speeches of other Senators,[13] but implicit in all of these adverse comments was the belief that the bill granted consumers a substantive right to damages, albeit perhaps without adequate procedural weapons to vindicate that right. Senator Sherman did not entirely disagree with the critics. He felt it important, however that, "a man injured by an unlawful

13. See, Remarks of Sen. Teller, *id.* at 2571 ("Who suffers by [a decrease in competition of oil]? The sixty-five millions of people in the United States who use oil . . . . How much damage have they sustained? It is inconsequential individually, but great to the whole mass of people . . . [T]hese great corporations do not care how frequently they are brought into court where the damages that the parties get are just simply twice what the individual who makes the complaint has sustained"); Remarks of Sen. Reagan, *id.* at 2564 ("[T]he great mass of the people who are the sufferers from these combinations and trusts will not have the means to employ counsel and to take witnesses to the Federal Courts, often at a great distance from them to vindicate and enforce their rights"); Remarks of Sen. Coke at *id.* 2516 ("If the party damnified, as has been said heretofore in this debate were a great corporation, a wealthy association, it could employ lawyers . . . but how could these consumers of the articles produced by these trusts, the great mass of our people—the individuals go about showing the damages they had suffered"?).

combination, [should] . . . have the power to sue in the courts of the United States . . . . Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations." 21 Cong. Rec. 2569 (1890).

b. The Bill as Revised by the Senate Judiciary Committee Provided for Consumer Actions.

After major debate on the bill, Senator Sherman's draft was referred to the Senate Judiciary Committee.[14] The bill reported back to the Senate on April 2, 1890, became the present version of the Sherman Act. The revised bill was hospitable to private rights of action. In the civil damages section, re-numbered § 7, plaintiffs were to be awarded treble damages, rather than the double damages called for by Sen. Sherman's original proposal.

Where Senator Sherman's proposal had provided for suit by "any person injured or damnified," the Judiciary Committee's draft gave a right of action to "any person injured in his business or property." It is this latter change that the majority of the Eighth Circuit interpreted as a rejection of Senator Sherman's original intent to provide "a private remedy to every person injured," including consumers.

The debates on the revised bill reveal that no such radical alteration was contemplated. In opening debate on the Judiciary Committee's version of the bill, Senator Hoar, an influential member of the Committee stated: "I shall not undertake to explain the bill, which is well understood," 21 Cong. Rec. 3145 (1890). Examination of the legislative history led former Solicitor General Bork to

14. The committee was composed of Senators Edmunds, George, Hoar, Ingalls and Evarts. See, M. Forkosch, *supra*, pp. 158-66.

take this comment to mean that the Judiciary Committee had not basically changed the thrust of Senator Sherman's original enactment. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7, 44-45 (1966). See, *id.* at 14-15.

More particularly, the remarks of Senator Edmunds, one of the principal draftsmen of the final bill,[15] and also Chairman of the Judiciary Committee, belie the assertion that the change from "person injured or damnified" to "person injured in his business or property" was a calculated limitation of the private right of action, or a rejection of consumer standing.

Section 7, he stated

> "provides that *any person who shall be injured, etc.* by anything declared unlawful in this act may sue therefor in the circuit court of the United States . . . without regard to the amount in controversy. That is all. The whole object of the seventh section is to relieve the circuit court of the United States from the question of *quantum* in dispute . . . . [T]his section merely gives in the circuit court of the United States *the right of anybody to sue who chooses to sue,* without regard to the amount in controversy." 21 Cong. Rec. 3148 (1890). (Emphasis supplied).

A carefully drawn exclusion of consumers would hardly be characterized as "any person who shall be injured, etc." by one of its principal draftsman. Nor would one of the authors of such a provision "repeat that this section was intended by the Committee on the Judiciary *to allow anybody who wished, to sue* in a court of the United States without regard to the $2,000 limitation." *Id.* at 3149. (Emphasis supplied).

15. See, *Pfizer Inc. v. Govt. of India, supra* 434 U. S. at 313; *Apex Hosiery v. Leader*, 310 U. S. 469, 489 n. 10 (1940).

In his "exhaustive analysis of the Sherman Act's legislative history" [16] Professor Forkosch noted: "If we accept the view that the final Sherman Act is designed to aid entrepreneurs only and that no consumer's interests are guarded in the act, except ultimately through its support of free competition, then a complete about face would have occurred between the time at which Sherman introduced his first bill and that at which he voted for the Act which bore his name . . . . The opinion of this writer . . . is that no such reversal did occur." M. Forkosch, *supra* pp. 97-98.

Even the criticisms of the Judiciary Committee's bill attest to its continuity with Senator Sherman's original proposal. Senator George, who had previously questioned the practical utility of the damage remedy to "consumers" (see, p. 16, *supra*) advanced an unsuccessful amendment to provide procedural mechanisms (some adopted many years later in Rule 23 of the Federal Rules of Civil Procedure) which would have allowed victims of monopolies to assert jointly the rights granted to them by the Act. 21 Cong. Rec. 3148 (1890).

In the absence of such mechanisms, he questioned, "How can a single man thus injured . . . from $10 to $50, with his witnesses, go to a distant town or city, employ a lawyer and sue one of these great trusts in a United States Court? —" *Id.* 3148.

Senator George went on to predict that without a means of aggregating claims:

> "[N]ot one suit will ever be brought under this seventh section by any person who is simply damaged in his character as a consumer . . . .
>
> If some great manufacturer has been injured by an advance in the price of his raw material, he can sue, but the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity for redress, and the bill so far as they are concerned will be a snare and a mere delusion. 21 Cong. Rec. 3150 (1890).

16. *Reiter v. Sonotone Corp.*, 579 F. 2d 1077, 1079 n. 4 (8th Cir. 1978).

Senator George, who was also a member of the Judiciary Committee, believed that the procedural ability to aggregate the substantive claims would provide a viable means for enforcing rights already granted under the Act.[17] Similarly, Senator Reagan argued that his proposed amendment to allow suits in state court under Section 7 would remedy the bill's failure to provide a more practical procedure to assert rights granted to "men of ordinary means." 21 Cong. Rec. 3146, 3147, 3149 (1890). In contrast, not a single senator made a comment which can be construed as rejecting the existence of a consumer cause of action for price fixing under the Sherman Act.

The Court of Appeals looked to the comments of Senator Morgan as support for a limitation of the scope of private actions. The context of these remarks robs them of authority for such a proposition. Senator Morgan, in opposition to Senator Reagan's proposal to allow treble damage actions in state court, declared:

> *"The Senator from Texas [Mr. Reagan] has been for many years trying to reform the transportation of this country, trying to reform its interstate commerce, and he is very eager and very anxious to give every remedy that ingenuity could possibly suggest, but I suggest to the Senator there is no occasion for going so far as*

17. Curiously, the 8th Circuit majority seemed to cite Senator George's comments as evidence that consumers were excluded from Section 7. 579 F. 2d at 1080.

> *to bring up a great constitutional difficulty over which war will be had.* This bill ought not to be a breeder of law suits. If there is any one duty we have got higher than on the respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation so far as we can." 21 Cong. Rec. 3149 (1890) (emphasis supplied)

The Court of Appeals neglected to quote the italicized portion in its reproduction of Senator Morgan's comments—which indicate not hostility to private suits, but distaste for constitutional ambiguity. Nor does its opinion reveal Senator Reagan's response, which is entitled to equal consideration: "If the senator will allow me I will suggest that the very object of this is to make litigation or there would be no use for it." *Id.*

In any event, neither the comments of Senator Morgan nor of Senator Reagan, who were not members of the Judiciary Committee which drafted the legislation, carry weight when compared to the statements of Senators Edmunds, Hoar and George, who served on the Committee.

Thus, as Professor Forkosch's study concluded:

> "[I]nvestigation on this point has led to the result that this relegation of the consumer to the position of a merely indirect beneficiary of the Sherman Act is not justified. The great wealth of evidence for the consumer interest which the bills and the debates have yielded make that theory not alone suspect, but clearly erroneous." M. Forkosch, *supra,* p. 143.

2. Section 4 of the Clayton Act Was Merely a Reenactment of Section 7.

Section 4 of the Clayton Act is in all pertinent respects a verbatim reenactment of Section 7 of the Sherman Act.

As stated in the *Report of the Senate Committee on the Judiciary,* S. Rep. No. 698, 63d Cong. 2d Sess., 45 (1914): "This section, which gives *any person injured* by a violation of the antitrust acts the right to sue in the Federal courts for threefold the damages by him sustained, including the costs and reasonable attorney's fees is not proposed to be amended in any particular." (Emphasis added.) Comments to this effect are scattered throughout the legislative history—in the initial House and Senate debates,[18] in the Hearings [19] and Reports [20] of these two bodies, and in the final House and Senate debates on the ultimately-enacted conference version.[21]

Although the 63rd Congress, like its predecessor the 51st, did not deem it necessary to define by statute the phrase "business or property," definitions of those words, which emerged during the course of the debate over the labor exemption, reaffirm the obvious meaning of the language employed. In order to make the point that "there is a *fundamental difference* between property and business," 51 Cong. Rec. 9559 (1914) (emphasis supplied), Representative Casey entered the following dictionary definitions into the Record:

> "Definition of property: Property means the domination of indefinite right of user and disposition which one lawfully exercises over particular things

18. Remarks of Representatives Floyd, 51 *Cong. Rec.* 1964 (1914) and Green, 51 *Cong. Rec.* 9595 (1914); remarks of Senator Shields, 51 *Cong. Rec.* 14,214 (1914).

19. Hearings before the Subcommittee of the Committee on the Judiciary, U. S. Senate, submitted during the 60th, 61st, and 62nd Congresses and compiled for use in consideration of H. R. 15, 657. *See,* House Report No. 627, page 36.

20. Senate Report No. 698, "Unlawful Restraints and Monopolies," submitted to the Senate on July 22, 1914, by Senator Culberson.

21. Remark of Representative Floyd, 51 *Cong. Rec.* 16,319 (1914); remarks of Senator Nelson, 51 *Cong. Rec.* 15,938 (1914).

or subjects and generally to the exclusion of all others. Property is ownership, the exclusive right of any person freely to use, enjoy, and dispose of any determinate object, whether real or personal." (English, and American Encyclopedia of Law.) 51 *Cong. Rec.* 9559 (1914).

"Definition of business: That which occupies the time, attention, and labor of men for the purpose of livelihood or profit; that which occupies the time, attention, and labor of man for the purpose of profit and improvement." (English and American Encyclopedia of Law.) 51 *Cong. Rec.* 9559 (1914).

In light of this distinction, the inclusion of both business and property in the disjunctive statutory language "injured in his business *or* property" takes on added significance. Both consumers and businesses have standing to sue for injury to that which they have the exclusive right to "use, enjoy, and dispose of," while businesses may sue for injury to "that which occupies . . . men for the purpose of livelihood or profit".[22]

Remarks throughout the Congressional Record which refer to standing in terms of business interests are easily located. But this proves only the self-evident—that injured businesses have standing also. All that can be gleaned from the legislative history of § 4 is an intention to extend the unconstricted remedy of predecessor § 7 of the Sherman Act to other violations outlawed by the Clayton Act.

22. The trilogy of *Weinberg, supra, Smith, supra* and *Gutierrez, supra,* erred in ignoring this portion of the relevant legislative history to conclude that "the phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interest, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature." 426 F. Supp. at 884.

3. The Antitrust Improvements Act of 1976 Supports Consumer Standing.

The text of the *parens patriae* provision, 15 U. S. C. § 15C, § 4C of the Clayton Act, provides in pertinent part:

"Sec. 4C(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae *on behalf of natural persons* residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section *for injury sustained by such natural persons to their property* by reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. (Emphasis supplied).

The treble damages provided in *parens patriae* actions are thus intended to benefit only "natural persons" injured in their "property", without duplicating any amounts awarded them for the same injury, and excluding "business entities". In view of the commitment of the 94th Congress to providing effective remedies for the non-business consumer,[23] Congress would not have selected the second half of the disjunctive phrase "business or *property*" as the criterion for injury if it understood the previous enactments

23. See, *e.g.*, H. R. Rep. No. 94-499, 94th Cong., 2d Sess. 4-12 reprinted in [1976] U. S. Code Cong. & Admin. News pp. 2572, 2573-80. (Noting that "the economic burden of many antitrust violations is borne in large measure by the consumer", at the retail level, but deploring the lack of "effective redress to injury inflicted on consumers", and stating that the purpose of the 1976 Act was to "solve" this problem.)

protecting "property" to exclude purchases by non-business consumers.

The legislators did not contemplate the creation of additional substantive liability in the 1976 Act; they did not propose to alter the definition of injury to business or property within the meaning of Section 4. Their intention was simply to create a new procedural device with which to enforce existing rights of recovery:

> "[The amendment] creates no new substantive liability. *Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under Section 4 of the Clayton Act,* even if, for practical reasons, the right to sue is not likely to be exercised. Subsection 4C(a) thus provides an *alternative* means to make *practically* available Federal remedies at law, previously denied, for the vindication of existing substantive claims. H. R. Rep. No. 94-499, 94th Cong., 1st Sess., 9 (1975) (Emphasis supplied)

If "property" in § 4 of the Clayton Act is now defined to exclude non-business purchases, "property" in § 4C of the 1976 Act will be similarly defined,[24] in effect rendering the *parens patriae* remedy a nullity.

Thus the very purposes and structure of the 1976 Act indicate Congress' conclusion that consumers may sue under the earlier Antitrust acts.[25] The Eighth Circuit's

24. See, *Illinois Brick Co. v. Illinois,* 431 U. S. 720, 733-34 n. 14 (1977).

25. Indeed, the consumer may exclude himself from the *parens* action and pursue his individual lawsuit. 15 U. S. C. § 15C(b)(2) and (3).

Both House and Senate Committee Reports disavowed any intent to restrain private treble damage litigation in providing a *parens patriae* alternative. *See,* H. R. Rept. No. 94-499, 94th Cong., 1st Sess. 19 (1975); S. Rept. No. 94-803, 94th Cong., 2d Sess. 38 (1976).

business purchase test disregards Congress' interpretation of § 4, and frustrates the *parens patriae* remedy. *Cf. Red Lion Broadcasting Co. v. F. C. C.,* 295 U. S. 367, 380-81 (1969).

III. A Limitation of Treble Damage Actions to "Business" Consumers Would Undermine Both the Deterrent and Remedial Purposes of the Antitrust Laws, and Cause Needless Confusion.

A. A Limitation to Business Consumers Would Frustrate the Purposes of the Antitrust Laws.

Last term, this court dealt with the question of whether foreign governments may maintain a treble damage action under the federal antitrust laws. *Pfizer Inc. v. Government of India,* 434 U. S. 308 (1978). The concerns articulated in that case run precisely parallel to the policies at issue here. The Court in *Pfizer* emphasized that:

> "§ 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.' *Illinois Brick Co. v. Illinois,* 431 U. S. 720, 746, 97 S. Ct. 2061, 2075, 52 L. Ed. 2d 707; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477, 485-486, 97 S. Ct. 690, 695-96, 50 L. Ed. 2d 701; *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U. S. 134, 139, 88 S. Ct. 1981, 1984, 20 L. Ed. 2d 982. To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers." 434 U. S. at 314-15.

Similarly, if the Eighth Circuit's "business purchaser" test becomes the law, price fixers of retail items like cars or gasoline would escape liability for that large portion of the damages caused by sales to non-business customers. A retail price fixing conspiracy in goods used only for personal consumption such as hearing aids would be entirely immune from damage actions.[26] On the other side of the equation, the "business purchaser" rule presents the prospect of arbitrarily denying compensation to a consumer who suffered an overcharge, when a "business purchaser" of the same goods from the same price-fixer receives three times his damages. Such results are neither equitable nor wise. If policies of deterrence and compensation warrant extending the damage remedy to foreign governments, whom Congress did not consider in its debates, *a fortiori* they mandate recognizing the domestic consumer's right of action, which the drafters of the Sherman Act explicitly contemplated.

In *Pfizer*, the court placed particular emphasis on deterrence:

> "Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages . . . . If on the other hand, potential antitrust violators must take account of the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators. *Id.* at 315.

To the extent that portions of a potential price fixer's sales attributable to "non-business" purchasers are carved out of

26. As set forth above, since the definitions of the *parens patriae* statute of 1976 track the language of § 4, and Congress explicitly disclaimed intention of creating new liability, states would be no better able to bring suit than the consumers themselves.

the base on which treble damages may be calculated, the option of price-fixing becomes more attractive to firms subject to that temptation.

The Eighth Circuit's opinion suggests that Federal prosecutions and government civil actions may substitute for treble damage recoveries as a deterrent. 579 F. 2d at 1086 n. 16. Such an argument ignores the fact that the current scheme of antitrust deterrence relies on private damage action to follow and complement government suits. See, *e.g., Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 320 (1965) ("We must necessarily rely on the one element of congressional intention which is plain . . . the clearly expressed desire that private parties be permitted the benefits of prior government actions."); *United States v. Borden Co.*, 347 U. S. 514, 518 (1954) ("private and public actions were intended to be cumulative.").

Congress has expressly indicated its intention to encourage this pattern of enforcement. See, *e.g.*, 15 U. S. C. § 16(a) (litigated government judgments are admitted as *prima facie* evidence in related private cases); 15 U. S. C. § 16(i) (pendency of government action tolls the statute of limitations for potential private actions); and 15 U. S. C. § 30 (depositions in government actions must be taken in public). The policy favoring the private suit arising from government investigation was reiterated by Congress in enacting the Antitrust Procedures and Penalties Act of 1974, which requires the United States in settling its own antitrust actions to consider and file an impact statement on "the remedies available to potential private plaintiffs damaged by the alleged violation" and the effect of settlement on related private actions. 15 U. S. C. § 16(b)(4). The same Act expressly authorizes the courts to consider impact upon related private litigation in deciding whether to approve consent decrees. 15 U. S. C. § 16(e)(2).

Recent empirical work has emphasized the importance of private actions, for it has shown that a large measure of the deterrent effect of government prosecutions arises out of the threat of subsequent private recoveries. In a 1978 study, a team of economists from the Center for Econometric Studies of the Justice System of Stanford University's Hoover Institution observes:

> "Rather than imprisonment, the recovery of treble damages by bread consumers or distributors appears to be the potentially significant cost of being prosecuted for price fixing."
>
> Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement; A Theoretical and Empirical Analysis;* Hoover Institution Technical Report ISDDE-1-78 (December 1978 draft) pp. 26-27.

After an econometric analysis of the pattern of prices in the bread industry, the report concludes:

> "Only when class actions represent a credible threat does the Department of Justice produce a significant deterrent effect by prosecuting a horizontal price-fixing conspiracy. . . . Judging from evidence in the bread industry, the deterrent effect of a criminal prosecution for price-fixing appears almost entirely dependent on the existence of a substantial civil remedy." *Id.* at pp. 33-34, 35-36.

By barring consumer actions, the Eighth Circuit's holding would eliminate this deterrent, and drastically weaken antitrust enforcement at the retail level.

The Court of Appeals in this case exhibited reluctance to credit the deterrent impact of consumer actions. This reluctance was apparently based on its perception that "defendants who are unwilling or unable to defend such suits are compelled for economic reasons to settle actions

otherwise meritless." 579 F. 2d at 1086. Leaving aside the propriety of allowing such judicial predilections to abrogate a congressionally-granted cause of action, the concern of the Court of Appeals is still premised on a misconception.

It is true that the prospect of liability and damages tends to induce settlement in class actions as in individual actions. But there is no reason to suppose that such pressures are necessarily unfair, or greater in consumer class actions than in suits among competing large corporations. If defendants have violated the antitrust laws, injuring thousands, or hundreds of thousands of consumers, it is appropriate that a suit to recoup the loss should create some pressure towards settlement. Where suits are truly meritless, the pressure is relieved by the prospect of summary judgment or vindication at trial, and there is no indication that class actions are pressed to judgment less often than individual suits by injured competitors.[27]

An empirical study of class actions by the Commerce Committee of the United States Senate in 1974, Committee on Commerce, United States Senate, *Class Action Study,* 93rd Cong. 2d Sess. (1974) observed, *inter alia*:

> "Critics have charged that a defendant faced with a class action is forced to settle even if plaintiff's claim is weak. However, defendants in those cases which have been completed evidently preferred initially to press for dismissal or summary judgment and did not feel pressed to settle. In fact, 44 of the 81 completed cases, or 55 *percent, have been disposed of in favor of the defendant on preliminary motions.* Summary judgment was granted in 11 cases, while 33 others

27. Several major price fixing class actions have proceeded to trial during recent years, including cases involving the alleged national price fixing of Datsun automobiles, master key systems, and plywood.

were dismissed. The most frequent reason for dismissal was failure to state a claim.

Dismissals

Failure to state a claim	16
Lack of jurisdiction	4
Voluntary dismissal by plaintiff	4
Improper party, lack of standing, mootness, res judicata	5
Want of prosecution	2
Other	2
Total	33

Because no statistics are compiled on types of disposition of civil cases in any federal court, it is impossible to determine whether this high proportion of cases with early disposition by motion in favor of defendant is unique to class actions. Furthermore, the underlying reasons for early dismissal are difficult to ascertain. Defendants might contend that the high rate of dismissal indicates that a high number of frivolous suits are brought, while plaintiffs might assert that the high dismissal rate reflects a judicial hostility to the class action device. In fact, however, interviews with defendants' attorneys disclosed that no more than a handful would label their opponents' cases as frivolous.

"If frivolous cases are brought, the high proportion of dismissals and summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before

agreeing to settle." (Emphasis added). *Id.*, Committee Print, pp. 9-10, cited with approval *Blackie v. Barrack*, 524 F. 2d 891, 899 n. 15 (9th Cir. 1975).

Equally important, the remedy proposed by the Eighth Circuit majority does not speak to the alleged evil. Business entities remain free to engage in the supposed meritless "blackmail" of class actions under the "business purchaser" rule. Consumers, on the other hand are barred from suit even when their actions follow government price fixing investigations and complaints, as do the suits brought by *amici* in this case.

B. The "Business Purchaser" Test Creates Needless Confusion in Antitrust Litigation.

The typical price fixing case currently presents three principal issues: did the defendants illegally conspire to fix prices; was the plaintiff overcharged as a result of the conspiracy; and if so, what was the amount of the overcharge (i.e., damage). The business purchaser rule adopted by the Eighth Circuit would add a fourth major line of inquiry as to every single purchase in a price fixing case: the use for which the purchased item was intended and the use to which it was put. Such an approach would "add whole new dimensions of complexity to treble damage suits and seriously undermine their effectiveness," *Illinois Brick Co. v. Illinois, supra* 431 U. S. at 737.

A single purchaser may engage in a substantial number of transactions. Many of these transactions may be for mixed use. The defendants' approach would require an intricate inquiry into the intended mixed use and actual mixed use of each purchase.

Suppose for example that citizen "A" purchased an automobile intending to use it in business, but did not in fact use it in business, while citizen "B" purchased an auto-

mobile intending personal use, but in fact used it in business. Is intended or actual use to govern? Is commuting to and from work a "business" or "non-business" use, or does this in turn depend upon the character of the business and the role of the driver (or the motor vehicle owner) in the business? How are mixed uses to be treated; how should a court characterize the purchase of an automobile intended for use or actually used for a variety of "business" and "non-business" purposes by one or more drivers? The permutations are virtually endless.

Difficulty of application may not always require rejection of a legal principle. But this Court has expressed its reluctance to adopt doctrines that would "greatly complicate and reduce the effectiveness of already protracted legal proceedings." *Illinois Brick Co. v. Illinois, supra. See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481, 493 (1968). The almost metaphysical intricacies latent in the "business purchaser" test counsel against introduction of an entirely novel and unwarranted distinction between business and non-business purchasers to plague courts and litigants.

CONCLUSION.

The judgment of the Court of Appeals should therefore be reversed and the case remanded.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

v.

SONOTONE CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OBJECTION OF RESPONDENTS TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE BY PLAINTIFFS IN KENNEDY SMITH v. TOYOTA MOTOR SALES U.S.A., AND FIVE RELATED CASES AND PLAINTIFFS IN DONNA JEAN WEINBERGER v. FEDERATED DEPARTMENT STORES AND RELATED CASES

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Plaintiffs in *Kennedy Smith v. Toyota Motor Sales U.S.A., Inc. and Five Related Cases,*[1] and plaintiffs in *Donna Jean Weinberger v. Federated Department Stores and Related Cases,*[2] (hereinafter referred to collectively as "Plaintiffs") have moved this Court under Rule 42(3) of the Rules of the United States Supreme Court for leave to file a brief as *amici curiae* in this case. Petitioner has consented to the filing of said brief. Respondents have refused to consent and object to the filing of such brief on the grounds that Plaintiffs' interest in this case is no different from that of Petitioner[3] and Plainiffs have failed to set forth facts or questions of law that have not been, or are not likely to be, presented by the Petitioner and Respondents, as required under Rule 42(3) of the Rules of the United States Supreme Court.

The Solicitor General has filed a brief for the United States as *amicus curiae* in support of the Petitioner's position. In addition, the Attorneys General for the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado,

[1]United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1849, 77-1850, 77-1851, 77-1852, 77-1724, and 77-1725. The named plaintiffs are: Kenneth Smith, Barry S. Kohn, Jonathan Kilburn Carr, Richard P. Gardner, Charleen Pellar, Marla Bussard, Marc D. Goldberg, Robert J. Berman, Debra Berman and Alan Blau.

[2]United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1547, 77-1548, 77-1549, 77-1550, and 77-1551. The named plaintiffs are: Donna Jean Weinberg, Eleanor Eisenberg, Sandra A. Musser, June Morgan, David M. Kimmel.

[3]Each Plaintiff is a non-business consumer. Each Plaintiff has brought a treble damage action under 15 U.S.C. §15 against certain firms for alleged unlawful price-fixing of goods purchased by such Plaintiffs. The Defendant firms moved to dismiss the complaints filed on the grounds that the Plaintiffs lacked standing because as retail non-business consumers, they had not been injured in their "business or property." The motions were granted. Appeals from those dismissals were argued before the Ninth Circuit and orders have been entered staying disposition of the appeals pending the decision in this case.

Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island and Providence Plantations, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming and the Commonwealths of Kentucky, Pennsylvania and Virginia have filed a brief as *amici curiae* in support of Petitioner. In view of the filing of such briefs *amici curiae,* it does appear that the Petitioner's position will be well represented. The Plaintiffs' motion for leave to file a brief *amici curiae* should be denied, because the Plaintiffs have no special or unusual interest in the outcome of this case different from that of the Petitioner's, Plaintiffs interest is well represented by Petitioner and other *amici curiae,* and Plaintiffs' brief is substantially duplicative and repetitious of the efforts of others.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER, PETITIONER
v.

SONOTONE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO THE OBJECTION OF RESPONDENTS

Respondents have filed an objection to the filing of the brief for the United States, contending that the brief was not timely filed.

The facts are as follows. The petition for a writ of certiorari was granted on January 8, 1979, making the brief for petitioner and any supporting amici due on February 22. No extensions of time were sought. The typescript brief for the United States was sent to the printer on the morning of February 16, 1979, with a request that page proofs be furnished on February 20, and final copy on February 22. On Sunday, February 18, and Monday, February 19, approximately two feet of snow fell in the District of Columbia. The printer's employees did not work on February 19 (a holiday) or February 20. Few employees reported for work on February 21. As a result, page proofs were not delivered until late afternoon on February 22.

These page proofs were mailed immediately to counsel, so that they would be aware of the arguments made by the United States and would have the full time allowed by the Court's rules

in which to respond. The proofs were corrected and returned to the printer on February 23. Printed copy was available in the afternoon of Monday, February 26, and was immediately mailed to counsel for respondents. (The statement by counsel for respondents that printed copies of the brief were not mailed until February 27 is incorrect.) The printed briefs contained no argument that was not present in the page proofs, which were timely served.*/ Under these circumstances, the objection to the filing of the brief by the United States is insubstantial.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

MARCH 9, 1979

*/ The only change in the versions (other than typographic and minor stylistic alterations) was the deletion from footnote 21 of a reference to a study to be published by the Department of Justice. The reference was deleted because the study is undergoing final revisions and has not yet been issued. (At the time we sent the typescript to the printer, the study was expected to be issued in late February, but that schedule has been delayed.) The tenor of the argument in footnote 21 was not changed by the deletion.